Supreme Court, U.S.
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No. 04- 04 621

IN THE

Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a municipal corporation in the State of Washington,

Petitioner,

v.

DYNEGY POWER MARKETING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's application of the filed rate doctrine to bar state law claims arising from the West Coast energy crisis, where the Federal Energy Regulatory Commission ("FERC") did not set rates but instead relied on market forces and therefore essentially eliminated compliance with the filing requirements of the Federal Power Act ("FPA"), directly conflicts with this Court's prior decisions requiring strict compliance with the filing requirements. Or to state it another way, whether the Court should expand the narrowly applied filed rate doctrine to encompass rates that were not filed, reviewed and approved by FERC but were instead established after-the-fact by "market forces."

2. Whether the Court should clarify the important and recurring issue of whether the FPA "occupies the field" to preempt plaintiff's state law claims when the FPA does not police anticompetitive or collusive conduct in the electricity market, leaving that to the federal antitrust laws and state regulation, including the California competition laws preempted by the Ninth Circuit here.

3. Whether the Court should answer an important and recurring issue as to the scope of conflict preemption under the FPA, and in particular, the issue of whether plaintiff's state law claims are "conflict" preempted by the FPA when an "actual conflict" does not exist. The Ninth Circuit's holding greatly expands the scope of conflict preemption beyond any previous decision of the Court.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following are parties to the case (as defendants): Dynegy Power Marketing, Inc; PG&E Energy Trading Holding Corporation; Powerex Corp.; Reliant Energy Services, Inc.; Sempra Energy Trading Corporation; Sempra Energy Resources; Mirant Corporation; Williams Energy Marketing and Trading Company; Duke Energy Trading and Marketing, LLC; NRG Energy, Inc.; and Xcel Energy, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Public Utility District No. 1 of Snohomish County ("petitioner" or "plaintiff") is a municipal corporation established under Title 54 of the Revised Code of Washington, and as such issues no stock and is prohibited from owning stock in any private corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit (Pet. App. A) is not reported and is cited herein as "Slip Op." The opinion of the district court (Pet. App. B) is reported at 244 F. Supp. 2d 1072 (S.D. Cal. 2003).

STATEMENT OF JURISDICTION

The opinion and judgment of the Court of Appeals was issued on September 10, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Cal. Bus. & Prof. Code § 17200 (the "Unfair Competition Law" or "UCL") (Pet. App. C); Cal. Bus. & Prof Code § 16720 (the "Cartwright Act") (Pet. App. D); 16 U.S.C. §§ 824 and 824d (relevant sections of the FPA) (Pet. App. E).

STATEMENT OF THE CASE

This case arises from the now well-documented and massive abuse of Western electricity markets that took place during 2000-01. Gross abuses of market power, including intentional withholding of supplies,[1] criminally fraudulent schemes such as "Death Star" and "Get Shorty,"[2] artificial "wash" trading of power and natural gas contracts,[3] and intentional manipulation

1. *E.g.*, Paul Joskow & Edward Kahn, *A Quantitative Analysis of Pricing Behavior in California's Wholesale Electric Market During Summer 2000: The Final Word* (Feb. 4, 2002).

2. ER 036; *see also* Plea Agreement, *U.S. v. Belden*, Dkt. No. CR02-0313 (N.D. Cal. Oct. 17, 2002); Plea Agreement, *U.S. v. Richter*, Dkt. No. CR03-00026 (N.D. Cal. Feb. 4, 2003); Plea Agreement, *U.S. v. Forney*, Dkt. No. CR03-0178 (N.D. Cal. Aug. 5, 2003).

3. ER 039; *see also, e.g.*, News Release, *Last Four Former El Paso Traders Charged with Reporting False Gas Trades Plead Guilty*, U.S. Dept. of Justice, U.S. Attorney's Office, S.D. Tex. (Oct. 29, 2004); (Cont'd)

of critical natural gas supplies,[4] all combined to drive electricity prices far higher than those ever before experienced. According to one study, the resulting economic crisis reduced 2002 Gross Regional Product by $35 billion, and employment by 589,000.[5]

Plaintiff, a municipal corporation providing electric utility service, alleges that defendants unlawfully fixed prices, restricted supply and otherwise manipulated markets operated by the California Power Exchange ("PX") and the California Independent System Operator ("ISO"), with devastating effects on interconnected electricity markets across the West. ER 002.

The Ninth Circuit applied the filed rate doctrine to dismiss plaintiff's claims. However, because a central element of a filed rate defense – the filing and approval of defendants' actual rates – is absent here, the doctrine cannot bar monetary relief. The Court of Appeals also conferred civil immunity on defendants by applying preemption in a partially deregulated market. Yet there is no field preemption because the FPA did not displace competition law. And conflict preemption does not apply because, *inter alia*, FERC is powerless to remedy antitrust violations. The Ninth Circuit's decision in this case radically

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(Cont'd)

News Release, *Two More Former El Paso Traders Plead Guilty to Falsely Reporting Gas Trades*, U.S. Dept. of Justice, U.S. Attorney's Office, S.D. Tex. (Oct. 19, 2004).

4. *See, e.g., Public Utils. Comm'n of Cal. v. El Paso Natural Gas Co. et al.*, 100 FERC ¶ 63,041, 2002 FERC Lexis 1906, at *46 (2002) (finding "a clear withholding of substantial [natural gas] capacity during the relevant period, which clearly indicates an exercise of market power"); *Public Utils. Comm'n of Cal. v. El Paso Natural Gas Co. et al.*, 105 FERC ¶ 61,201, 2003 FERC Lexis 2259 (2003) (approving $1.6 billion settlement), *reh'g denied*, 106 FERC ¶ 61,315 (2004).

5. Ottie Nabors, George Backus & Jeff Amlin, *Simulating Effects of Business Decisions on Regional Economy: Experience During the California Energy Crisis*, J. INDUS., COMPETITION & TRADE, vol. 2, at 143 (June 2002).

departs from this Court's teachings about preemption and the filed rate doctrine and conflicts with holdings of other circuits. This Court should grant *certiorari* to resolve conflicts between the Ninth Circuit's decision and those of this Court and other circuits and to answer important and recurring questions about the vitality of competition law in deregulating energy markets.

1. Before 1996, electricity generation and distribution in California was primarily controlled by vertically integrated utilities and tightly regulated by the California Public Utilities Commission ("CPUC"), which regulated operations and retail prices, and FERC, which regulated some wholesale transactions and interstate transmissions. ER 008. Utilities or generators were required in advance to submit detailed and voluminous tariffs to FERC setting forth the "cost based rates" they wished to charge. If FERC approved, the prices described in the tariff became the "filed rates" charged to customers. Deviations from those rates were not permitted absent FERC approval of a revised tariff. This allowed parties to determine prices in advance merely by examining the tariff. ER 007-08.

In 1996, California deregulated its electric power industry by enacting A.B. 1890, Pub. Util. Code § 330, *et seq.* Deregulation sought to introduce competitive market forces into the generation and sale of electric power, which would theoretically lower prices. ER 008. ***In lieu of cost-based rates set through regulation and the approval of filed rates, market forces would set electricity prices. Wholesale electricity supply and prices would no longer be pre-approved by FERC or any other regulatory entity at the federal or state level.*** Generators were no longer required to submit tariffs detailing the precise rates they intended to charge, or even articulate a formula that would yield a price. Thus, any generator could charge any price that a buyer would be willing to pay without any prior scrutiny or approval from FERC.

As required by the new law, the three major California electric utilities sold most of their electricity-generating assets to other parties in order to create competition. All of these assets ultimately fell under the collective control of five defendants herein, Duke, Reliant, Dynegy, Mirant and Williams (the "generating defendants"), who controlled the state's electricity prices when demand exceeded 20,000 MW. ER 010-12.

Largely unregulated energy traders and marketers also played dominant roles in the California electricity market (the "trading defendants"). These traders, many of which were corporate affiliates of the generators, bought electricity from the generators and resold it to utilities and other purchasers. ER 021-29.

Legislative investigations, criminal guilty pleas and other investigations have established that these defendants engaged in unlawful conduct on an epic scale. The generating and trading defendants engaged in a variety of unlawful schemes to manipulate the California markets and artificially inflate electricity prices. They agreed to withhold production in order to create an artificial shortage of capacity, which in turn would cause the ISO to declare an emergency and purchase power from the generating defendants at prices driven up by the artificially created emergency. In a competitive market, absent collusion, the generating defendants would not have restricted supply as they did from May 2000 through September 2001. ER 031-32.[6] The trading defendants also engaged in unlawful market manipulation through the use of a variety of devices that resulted in artificial price inflation. ER 035-36.

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6. The PX and ISO operated structured markets that established a "market-clearing price," which was the price of the highest accepted offer to sell in a particular auction and became the established price for ***all*** sellers in that time frame. Consequently, there was a strong incentive to game the system to drive up the market-clearing price. ER 008-09, 028.

Because California and the Pacific Northwest form a large interconnected market, the dysfunctions in buying and selling in California spilled over into the Northwest, producing severe price spikes that mirrored the dysfunctions of California. And, because the spot markets directly affect prices in the forward markets, forward market prices were driven to unprecedented heights as well. Defendants' unlawful activity produced potentially crippling increases in short-term market prices, resulting in plaintiff's execution of long-term contracts in order to mitigate exposure to the short-term market. These purchases were made at prices that were substantially inflated by defendants' wrongful conduct, ER 039-40, and plaintiff brought claims for violations of the Cartwright Act and the UCL.

2. The district court, which had jurisdiction under 28 U.S.C. § 1332, dismissed the case on the basis that plaintiff's claims were barred by field and conflict preemption and the filed rate doctrine.

3. The Ninth Circuit affirmed. Despite finding that FERC had waived many of its tariff filing requirements in favor of market-based rates, the Court of Appeals held that plaintiff's claims were barred by field preemption, conflict preemption and the filed rate doctrine. Slip Op. at 13263. Framing the "fundamental question" as whether "FERC is doing enough regulation to justify federal preemption of state laws," *id.* at 13260, the court found that FERC's general oversight sufficed. It also found that plaintiff's claims, which sought to remedy gross abuses of market power, constituted an impermissible encroachment on FERC's regulatory powers. *Id.* at 13263. In doing so, the court failed to review and apply this Court's jurisprudence on the limited scope of preemption and the filed rate doctrine in wholesale electricity markets and produced results wildly divergent from other Courts of Appeal.

REASONS FOR GRANTING THE PETITION

This case raises recurring issues of exceptional and widespread importance. Indeed, the impact of the Ninth Circuit's ruling cannot be overstated, because under the holding, state courts and federal courts applying state law are powerless to award relief, no matter the level of wrongdoing, because the court has found that FERC is the exclusive repository of all authority in this arena even though it has significantly deregulated electricity markets. The Court of Appeals' ruling contravenes decades of decisions from this Court and others narrowly proscribing application of the filed rate doctrine and limiting the preemptive scope of the FPA.

The filed rate doctrine does not bar plaintiff's state law antitrust and consumer protection claims. This doctrine applies only when a rate statute's strict filing requirements are met and, even then, has come under intense criticism, surviving only on the basis of *stare decisis*. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 417 (1986). FERC's market-based rate program eliminated filed rate requirements. Accordingly, and in direct conflict with this Court's prior decisions, *see, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990), the Ninth Circuit ***expanded*** a dying doctrine in a manner unsupported by any of the doctrine's policy justifications, with the net effect of destroying state power to regulate competition in this critical industry. This is a dangerous expansion of a doctrine that this Court and other circuit courts have narrowly circumscribed and as such has sweeping consequences for those subject to the filed rate defense, including thousands of similarly situated utilities and millions of consumers who have lost billions of dollars as a result of defendants' unquestionably anticompetitive conduct – conduct that has in many instances resulted in criminal guilty pleas.

The Ninth Circuit's application of field preemption also conflicts with established precedent. There is a strong presumption against preemption of state police powers, which include consumer protection and competition laws that can only be overcome by demonstrating a clear Congressional intent to preempt the entire field. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Congress intended otherwise, and consequently many courts have recognized that competition laws apply notwithstanding the FPA's comprehensive regulation of wholesale rates. *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973). The FPA was conceived as a supplement to, and not a substitute for, state regulation, including antitrust and unfair competition regulation. *Connecticut Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 524-25 (1945). Accordingly, decisions applying federal antitrust law in the energy field encompass the application of these equivalent state proscriptions. *E.g.*, *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479 (7th Cir. 1991). Indeed, courts have held that state law applies as a necessary default in deregulated industries – a logical result given that the application of state antitrust and consumer protection laws in a market-based regime promotes the federal policy of encouraging the development of healthy, competitive markets.

The Ninth Circuit's finding of "conflict" preemption also departs from established jurisprudence and represents a sweeping expansion of this doctrine as set forth by this and other courts. An actual, existing conflict with the FPA or a FERC order – and not a potential conflict – must exist to support a claim of conflict preemption, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 899 (2000), yet the Court of Appeals was unable to cite any actual conflict. Nor is such a conflict conceivable. FERC is powerless to remedy antitrust violations. *California v. Federal Power Comm'n*, 369 U.S. 482, 490 (1962). Moreover, FERC's authority is limited to assuring that the rates,

terms and conditions of wholesale electric sales in interstate commerce are "just and reasonable." *San Diego Gas & Elec. Co. v. Sellers*, 93 FERC ¶ 61,121, 2000 FERC Lexis 2168, at *98 (2000). And, while FERC has sought to remedy a very limited subset of market violations, it has done so only on the narrow basis that defendants' illegal activities may have violated FERC-approved tariffs governing, for example, the operation of the PX and ISO markets. There is no reason that the gross violations alleged here do not constitute ***both*** a violation of those tariffs and of state laws barring unfair competition, and there is no reason to conclude that a FERC order requiring defendants to disgorge unjust profits under the tariffs would conflict with an order requiring them to pay damages under state antitrust and unfair competition laws.

Moreover, the Ninth Circuit's implied preemption ruling conflicts with *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), where the court decided that it was empowered to reject or modify FERC jurisdictional contracts unless the claim directly "challenged a filed rate." *Id.* at 519-20. Applying the *Mirant* standard here, plaintiff's claims survive because they do not challenge any FERC jurisdictional contracts or rates in light of FERC's elimination of the prior regulatory regime's requirement that defendants file contracts and that FERC approve those contract rates as "just and reasonable" under the FPA. Thus, an award here would not change a single FERC-approved contract or rate, rendering the Ninth Circuit's test in direct conflict with the standard provided in *Mirant*.

Enforcement of unfair competition laws promotes, rather than conflicts with, the promotion of workable competition in deregulated electricity markets. Thus, this case also presents important questions concerning the application of state competition law to substantially deregulated markets. The Ninth Circuit's conclusion that state competition law is preempted in such markets ignores precedents laid down by this Court, creates

a conflict among circuits at a critical time of crisis, and defeats the FPA's primary goal of "curb[ing] abusive practices of public utility companies by bringing them under effective control" and providing "effective federal regulation of the electric-utility industry." *Gulf States Utils. Co. v. Federal Power Comm'n*, 411 U.S. 747, 758 (1973).

Congress did not intend to preempt the antitrust laws in the prior regulatory era where FERC, and not market mechanisms, set rates; *a fortiori*, Congress certainly could not have intended to immunize defendants from antitrust liability where energy prices are determined by market forces not even contemplated when Congress enacted the FPA. Thus, the Court of Appeals' ruling leaves consumers without an adequate remedy and results in a regulatory gap in which a market is left unprotected by both a rate-setting agency and traditional competition laws. Guidance from the Court on this issue is critical, and this case presents an excellent vehicle in which to provide it.

This action represents the leading edge of literally hundreds of cases resulting from the West Coast energy crisis, cases where FPA preemption and the application of the filed rate doctrine will be threshold legal issues that are repeatedly decided. For instance, there are approximately 34 cases pending before the Ninth Circuit alone and another 14 or so in district courts within the Ninth Circuit,[7] most of which will be barred by the Court of Appeals' application of the filed doctrine and its omnibus preemption ruling here (if they have not already been). In addition, the same issues have arisen in, for example, the deregulated electricity market in Texas,[8] and repeatedly in the

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7. *See* Pet. App. F. This chart does not include cases in other circuits and cases in state courts.

8. *See Texas Commercial Energy v. TXU Energy, Inc.*, 2004 WL 1777597 (S.D. Tex. June 24, 2004).

Enron bankruptcy, where the court has barred fraud, racketeering and antitrust claims.[9]

Moreover, these important issues are likely to recur as the trend toward deregulation continues. As Dr. Paul Joskow, one of the leading experts on the economics of electricity, notes, "[t]he unusual attributes of electricity . . . create unusual opportunities for suppliers to exercise market power unilaterally. Market power problems have been extensively documented in the U.S. and other countries" experimenting with electricity deregulation.[10] And these problems are not confined to the FPA, but also arise under the FPA's statutory sibling, the Natural Gas Act.[11]

Accordingly, this Court should grant *certiorari* to reinforce its precedents establishing the narrowness of the filed rate doctrine and the limits of FPA preemption; reinforce the plenary role of state competition laws in deregulated electricity markets; rationalize conflicting law in the circuits on these issues; and in the process provide both (i) clear standards against which those accused of engineering a massive wrong that has adversely impacted so many citizens will be judged in multiple courts throughout the country; and (ii) predictable norms that will govern the electricity market in the future.

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9. *See Enron Power Mktg., Inc. v. Nevada Power Co. (In re Enron Corp.)*, Case No. 01 B 16034 (AJG), Adv. Pro. No. 02-2520, slip op. at 2-7 (Aug. 28, 2003) (Gonzalez, J.) (Pet. App. G), *vacated and remanded on other grounds*, 03 Civ. 9318, 9332 (BSJ) (S.D.N.Y. Oct. 10, 2004).

10. Paul L. Joskow, *The Difficult Transition to Competitive Electricity Markets in the U.S.*, at 29 (May 2003).

11. *See* Minute Order, *Natural Gas Antitrust Cases*, Nos. 4221 *et al.* (Cal. Sup. Ct., San Diego County, September 30, 2004) (concluding that state claims arising from the manipulation of natural gas markets during the crisis period are not barred by the Natural Gas Act) (Pet. App. H).

I. The Ninth Circuit's Decision Squarely Conflicts With Precedent From This Court And Other Circuits Holding That The Filed Rate Doctrine Does Not Apply In The Absence Of Validly Filed Rates.

This Court has never applied the filed rate doctrine to instances in which rates were not filed – the precise facts presented in this case – yet the Ninth Circuit has done so in direct contravention of several of this Court's prior decisions, including *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990). Therefore, this Court should grant *certiorari* to reinforce its prior decisions and overturn the Court of Appeals' expansion of a doctrine originally intended to protect consumers but now wielded as a shield to protect wrongdoers.

A. Ongoing FERC Oversight is Not a Substitute for Validly Filed Rates, and the Ninth Circuit's Ruling That It Can Be Constitutes a Drastic Departure From This Court's Jurisprudence and Decisions From Other Circuits.

This Court has repeatedly held that compliance with a rate statute's strict filing requirements is "***utterly central***" to a claim of filed rate protection. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. at 132-33 (emphasis added). Absent strict adherence to these most basic of filing requirements, the filed rate doctrine is rendered "nugatory." *Id.* at 133. Thus, when rates are not validly "on file because [the] tariff ***lacked an essential element***," the doctrine does not apply. *Security Servs. v. Kmart Corp.*, 511 U.S. 431, 439-40 (1994) (emphasis added).[12] As Chief Justice Rehnquist has explained, the doctrine serves to "pre-empt only those suits that seek to alter the terms and

12. The tariff accepted by the agency did not include an essential element – the distances that a shipper could use to calculate charges. *Id.* at 433. Although the distances could be determined based on an industry mileage guide, *id.*, this defect precluded applying the doctrine. *Id.* at 440. Notably, the Court referenced "some . . . debate in other forums about the wisdom of the filed rate doctrine." *Id.* at 440.

conditions provided for in the tariff," and consequently "does not serve as a shield against all actions based in state law." *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 229-31 (1998); *see also Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 417 (1986) (noting criticisms of the doctrine and upholding it purely as a matter of *stare decisis*).

This Court has ***never*** applied the filed rate doctrine beyond the context of specific rates, formulae[13] or other activities filed and approved by a regulatory body *ex ante*. Nor have the appellate courts until this case. *See, e.g., Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995) ("the [Supreme] Court has emphasized the limited scope of the filed rate doctrine to preclude damage claims only where there are validly filed rates") (citing cases); *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 495 (D.C. Cir. 1985) (Scalia, J.) (tariff specifying that a rate would adhere to certain accounting principles did not constitute a filed rate because the statute required specification of the rate).

FPA § 205(c) provides that utilities "shall file schedules showing all rates and charges for any transmission or sale" and keep them open for public inspection. 16 U.S.C. § 824(d)(c). This statute is the touchstone for applying the filed rate doctrine. *See, e.g., Security Servs., passim*; *Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) ("The filed rate doctrine does not have a life of its own. Its application depends on the underlying statute.").[14] However, defendants do not operate under tariffs that contain any rates, formulas or prescriptions that serve to

13. If a formula is submitted in lieu of specific rates, the formula must be "stated with such clarity that a third party can easily calculate the rate charged. . . ." *NorAm Gas Transmission Co.*, 77 FERC ¶ 61,011, 1996 FERC Lexis 1823, at *30 (Oct. 2, 1996).

14. Application of the doctrine under the FPA "rests on two provisions: section 205(c), which requires utilities to file rate schedules with [FERC], and section 206(a), which allows [FERC] to fix rates and charges, but only prospectively." *Id.* at 71-72 (footnotes omitted).

limit their pricing discretion.[15] Rather, the market-based "umbrella" tariffs utilized by FERC here constitute a blanket grant of authority to charge rates set in the market – rates that are not filed with, and reviewed by, FERC *ex ante* but which continually fluctuate with market prices.[16] Consequently, under this Court's jurisprudence, the filed rate doctrine cannot apply. The Ninth Circuit's decision here thus conflicts with this Court's decisions, including *Maislin* and *Security Services*, and those of at least two other circuit courts.

And the Ninth Circuit's view that general agency oversight can be a functional substitute for the *ex ante* filing of specific rates or formulae (*see* Slip. Op. at 13261-62) "greatly understates the extent to which [FERC's] policy deviates from the filing requirement, and greatly undervalues the importance of the filing requirement itself." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994). Application of the doctrine based on general principles of agency oversight has never been upheld. Indeed, *ex post* enforcement actions like those cited by the Court of Appeals, Slip Op. at 13262, are insufficient substitutes for advance review of specifically filed rates. *MCI*, 512 U.S. at 229-34. Furthermore, the absence of filed rates prohibited application of the doctrine ***even*** in cases where the relevant agency exercised extensive regulatory oversight. *See, e.g., Security Servs.*, 511

15. FERC's market-based rate regime exempts defendants and other regulated utilities from filing rates, including rates contained in contracts. *See* Order No. 2001, "Revised Public Utility Filing Requirements," FERC Stats. & Regs. Preambles ¶ 31,127 at 4-8 (2002). FERC permitted the market to set rates in order to bring more efficient and lower priced power to electricity consumers. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. Parts 35 and 385).

16. Indeed, FERC itself has ruled that market-based agreements made pursuant to umbrella tariffs are ***not*** rate schedules. *Vermont Pub. Power Supply Auth. v. PG&E Energy Trading — Power, L.P.*, 104 FERC ¶ 61,185, 2003 FERC Lexis 1593, at *14 (Aug. 1, 2003).

U.S. at 440; *Maislin*, 497 U.S. at 132-33; *Florida Power & Light*, 64 F.3d at 616; *Electrical Dist. No. 1*, 774 F.2d at 490.

Nor can the doctrine be predicated on the quarterly informational filings (*see* Slip Op. at 13261), which are both retrospective and incomplete. Even FERC has stated that the post-sale quarterly filings do not qualify as the "filed rate," *see, e.g.*, *San Diego Gas & Elec. Co. v. Sellers*, 96 FERC ¶ 61,120 at 61,506, 2001 FERC Lexis 1810, at *29-30 (July 25, 2001), and FERC has acknowledged that during the height of the energy crisis the quarterly reports of several major wholesalers failed to include the transaction-specific data required for FERC to at least theoretically monitor the market. *State v. British Columbia Power Exch. Corp.*, 99 FERC ¶ 61,247 at 62,066, 2002 FERC Lexis 1131, at *51 (May 31, 2002). Indeed, the Ninth Circuit itself concluded in another case that there was a "patent failure of many of the affected companies to provide even minimal reporting" in their quarterly filings, and that "FERC abdicat[ed] its regulatory responsibility" during the crisis period. *California ex rel. Lockyer v. FERC*, No. 02-73093, slip op. at 13136 (9th Cir. Sept. 9, 2004) (Pet. App. I).

Nor can the doctrine apply based on the ISO and PX market tariffs as posited by the Ninth Circuit. *See* Slip Op. at 13262. As the Court made clear in *Security Services*, the filed rate defense does not apply to rates set forth in an unrelated party's tariff. 511 U.S. at 439-40. Furthermore, the PX and ISO tariffs describe the market mechanisms by which rates would be determined but cannot be used to calculate ***any*** rate in ***any*** transaction since prices were determined by the bidding behavior of buyers and sellers.

Given the narrowness of doctrine, regulatory agencies may ***not*** rely on un-filed, privately negotiated rates to fulfill their statutory obligation to ensure just and reasonable rates, ***even where the agency has determined that competition will act as a check against excessive prices***. *MCI*, 512 U.S. at 230-32; *Maislin*, 497 U.S. at 126-34. Application of the doctrine here is

thus a drastic departure from this Court's filed rate jurisprudence intended to narrowly proscribe application of this rule of immunity.

B. The Policy Reasons Underlying the Doctrine Do Not Apply Where Rates Have Not Been Filed — The Ninth Circuit's Decision Thus Erodes and Conflicts with Carefully Reasoned Precedent.

Not only did the Court of Appeals depart from well-established Supreme Court precedent, it did so without explaining how applying the filed rate doctrine here would further the doctrine's policy justifications as established by this Court. The doctrine serves three purposes: (i) prevent price discrimination through "secret negotiation;" (ii) defer to agency rate-making authority; and (iii) provide "necessary predictability" for utility customers. *Maislin*, 497 U.S. at 130; *Marcus v. AT&T Corp.*, 138 F.3d 46, 58-61 (2d Cir. 1998); *Electrical Dist. No. 1*, 774 F.2d at 493. Not one of these purposes is furthered by a rate filing that merely states that rates will be determined by agreement between parties in the marketplace.

Market-based tariffs eliminate any notion of pricing uniformity. *See Maislin*, 497 U.S. at 130 (allowing private agreements to set rates undermines the goal of preventing discriminatory pricing). And because they do not constitute ratemaking but instead rely on market forces to shape pricing, courts are competent to evaluate fraud, deception, antitrust, and other similar unfair business practice claims, *see, e.g.*, *Marcus*, 138 F.3d at 62 (citing cases), particularly where it is agreed that FERC has no antitrust enforcement powers. Finally, the rates at issue here have been far from predictable. As Justice Scalia explained when writing for the Court of Appeals for the District of Columbia, "***providing the necessary predictability is the whole purpose of the well established 'filed rate' doctrine***," and a filing "setting forth no more than the basic principles pursuant to which the new rates are to be calculated" would

frustrate that goal and "make unforeseeable liabilities a regular consequence of rate adjustments under § 206." *Electrical Dist. No. 1*, 774 F.2d at 492-93 (citations omitted; emphasis added).

Deciding whether the filed rate doctrine applies to immunize defendants' conduct is not an exercise in determining whether "FERC is doing enough regulation" as postulated by the Ninth Circuit. Slip Op. at 13260. Actually filed rates afford fundamental protections that underpin the doctrine. The tariff itself, and not FERC's ability to predict market outcomes or its extremely limited power to retroactively refund, is the touchstone for applying the doctrine. Simply put, the purpose of required rate filings is to render rates "definite and certain." *Maislin*, 497 U.S. at 126. There is nothing "definite and certain" about a market-based tariff, or general agency oversight, particularly when a doctrine that is universally acknowledged to be a ***narrow*** one is broadly applied to limit state police powers.

If the unprecedented application of the filed rate doctrine to tariffs that do not contain rates is contemplated, sound policy reasons corresponding to those recognized in earlier appellate decisions should exist. Yet the Court of Appeals advanced none. Instead, it morphed a doctrine and statute originally intended by this Court to protect consumers, *Electrical Dist. No. 1*, 774 F.2d at 493, into a shield that protects wrongdoers. And in doing so, the Ninth Circuit relied upon "many of the general statements in older decisions" that have limited, if any, application in a deregulated industry "never anticipated by the drafters" of the FPA. *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 76 (1st Cir. 2002).

II. The FPA Does Not Preempt Plaintiff's Claims, Yet The Ninth Circuit Expanded The Scope Of Preemption In A Manner That Both Conflicts With Other Courts And Invokes Important And Recurring Federal Issues That Remain Unsettled.

In upholding FPA preemption, the Court of Appeals focused on the wrong inquiry and has ruled on an important question that has not been squarely decided, but should be — to what extent does the FPA preempt state antitrust law? The decision conflicts with other circuit decisions defining the scope of FERC's exclusive jurisdiction. The Ninth Circuit did not examine whether Congress intended to preempt the field when it enacted the FPA, and it failed to review well-established precedent from this Court and other circuits limiting the scope of exclusive federal jurisdiction to direct efforts by states to regulate the rates charged in interstate wholesale energy transactions. Nor did the court take any heed of the regulatory gap created by its holding. Instead, it fleetingly reviewed the irrelevant issue of whether FERC was taking at least some regulatory actions.

The Ninth Circuit's preemption finding will impact hundreds of cases resulting from the West Coast energy crisis and many more in the years to come as deregulation continues or even accelerates. Therefore, this Court should grant *certiorari* to rationalize conflicting law in the circuits, to clarify that antitrust remedies are available to police market power abuses in this critical industry, and to squarely delineate the intersection of antitrust law and the FPA in light of deregulation.

A. Congress Did Not Preempt the Operation of Competition Laws in Wholesale Electricity Markets.

Congress did not intend the FPA to displace state authority over the power industry. Rather, in direct response to several rulings by the Supreme Court recognizing constitutional

limitations on state power to regulate interstate power sales, Congress enacted the FPA to supplement the states' ability to regulate electric utilities by providing federal authority over the interstate transmission and sale of wholesale electricity. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 212-14 (1964); *see also Connecticut Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 526 (1945). Congress intended to limit FERC's jurisdiction under the FPA only to matters beyond state control and preserved state regulatory authority. *Connecticut Light & Power Co.*, 324 U.S. at 524-25. Thus, the FPA was "conceived entirely as a supplement to, and not a substitute for, State regulation." *Id.*; *see also* 16 U.S.C. § 824(a) (declaring that federal regulation of the transmission and sale of electric energy was "to extend only to those matters which are not subject to regulation by the States.").

This Court has emphasized that the FPA does not "insulate electric power companies from the operation of the antitrust laws" and "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973). Indeed, Congress favored, wherever possible, application of antitrust law rather than regulatory coercion. *Id.*

Innumerable courts have echoed *Otter Tail*'s conclusion that federal antitrust laws apply to the power industry notwithstanding the FPA. *See, e.g., New York v. FERC*, 535 U.S. 1, 9 n.6 (2002) ("the FPA's existence did not preclude the applicability of the antitrust laws"); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976) ("the federal antitrust laws are applicable to electrical utilities"); *California v. Federal Power Comm'n*, 369 U.S. at 485 (the antitrust laws were not entrusted to the commission); *City of Mishawaka v. Indiana & Mich. Elec. Co.*, 560 F.2d 1314, 1321 (7th Cir. 1977) ("[A]fter *Otter Tail* . . . 'there can be no doubt about the proposition that

the federal antitrust laws are applicable to the electric utilities.'"). The Ninth Circuit completely ignored these decisions.

B. The FPA Accommodates State Antitrust Claims, and the Decision Below Raises Important and Unanswered Questions Regarding the Extent of State Antitrust Enforcement.

Though *Otter Tail* and its progeny addressed federal antitrust laws, California antitrust laws are quite similar, *see, e.g., Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1350 (9th Cir. 1983); *Hamro v. Shell Oil Co.*, 674 F.2d 784, 786-87 (9th Cir. 1982), and therefore operate concurrently. *E.g., Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427 (9th Cir. 1984); *Younger v. Jenson*, 26 Cal. 3d 397, 605 P.2d 813, 818 (1980). California prohibited anticompetitive practices more than a decade before Congress enacted the FPA.[17] Thus, California utility competition regulation was an area of state regulation untouched by the FPA (as contemplated by 16 U.S.C. § 824(a)) and therefore not preempted. *See, e.g., First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 151 F.2d 20, 23-24 (D.C. Cir. 1945) ("The fact that particular phases of an interstate activity have long been regulated by states, has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory laws should be declared valid.") (footnote citations omitted), *rev'd on other grounds*, 328 U.S. 152 (1946).

Indeed, courts have held that the Natural Gas Act ("NGA") did not preclude application of state antitrust law to redress anticompetitive conduct, notwithstanding exclusive agency

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17. The Cartwright Act was enacted in 1907. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 985 (9th Cir. 2000). The first UCL statute (then codified at Civil Code § 3369) was enacted in 1933. *People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 769-70 & n.1, 20 Cal. Rptr. 516 (3d Dist. 1962).

authority over ratemaking.[18] *See, e.g., Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479 (7th Cir. 1991) ("When state antitrust law only mirrors federal antitrust law, there is no reason to conclude that Congress intended to preempt the state law."); *Younger*, 605 P.2d at 819-20 ("Proceedings to prevent or redress anticompetitive agreements or monopolizations that contaminate the private component of the rate-making process do not undercut or impair [FERC's] regulatory function.").

Because the FPA preserves federal antitrust claims against anticompetitive and collusive conduct – notwithstanding FERC's jurisdiction over interstate energy rate setting – there is no basis for the Ninth Circuit's finding that the FPA so completely occupies the field that it necessarily preempts corresponding state antitrust law. Claims under state and federal antitrust law ***target the same misconduct and seek the same remedies***. The state claims would thus no more intrude on FERC's rate-setting authority than would the federal antitrust claims.

The application of state competition law as a default norm invokes important federalism interests, and it appears that no court has previously addressed the issue in the context of electricity markets. Nonetheless, this Court has never ruled that laws of general application, like state antitrust and consumer protection laws, are pre-empted by the FPA.[19] And, as noted,

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18. The FPA and NGA are interpreted *in pari materia*. *See, e.g., Kentucky Utils. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985).

19. The appropriate field exclusively reserved to FERC is in the direct, transaction-specific regulation of wholesale and interstate energy markets. This is why courts have blocked efforts by state utility commissions to directly regulate rates and transmissions. Indeed, all Supreme Court cases in this field address such direct, industry-specific regulation. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

courts have recently applied antitrust law in the natural gas market. The Ninth Circuit's opinion therefore stands as a radical departure from this Court's analysis of the pre-emptive scope of the FPA and those of other courts under the analogous NGA. Such an expansive reading is inconsistent with the deference accorded state competition laws, and with Congress's clear intention not to displace state law.

C. There Is No Conflict Preemption, and the Ninth Circuit's Conflict Analysis Departs from Decisions of This, and Other, Courts.

Courts find implied or "conflict" preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 899 (2000); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). There must be an ***actual, existing conflict*** – as opposed to a potential, future conflict – between state and federal laws or regulations. *Geier*, 529 U.S. at 884. Preemption is not implied where only a future, potential conflict may exist. *Otter Tail*, 410 U.S. at 377.

In finding preemption, the Court of Appeals ruled that monetary relief would necessarily result in a "fair price" determination that would interfere with FERC's exclusive jurisdiction to set wholesale rates. Slip. Op. at 13263. But this is simply incorrect because plaintiff seeks to remedy defendants' misconduct and not to change any prices contained in FERC-jurisdictional contracts or tariffs (especially since FERC has not approved any such prices).

The Ninth Circuit also failed to recognize that FERC is powerless to enforce antitrust laws or impose antitrust penalties.[20] *See, e.g., California v. Federal Power Comm'n*, 369

20. *See, e.g.*, Pet. App. J (July 7, 2004, letter from FERC Chairman Pat Wood, III, to Senator Maria Cantwell) (The FPA's limitations "require[] that remedies be prospective, i.e., refunds for unjust and (Cont'd)

U.S. 482, 490 (1962); *San Diego Gas & Elec. Co. v. Sellers*, 95 FERC ¶ 61,418, 2001 FERC Lexis 1440, at *95 (June 19, 2001) (FERC cannot impose penalties or treble damages); *Energy Servs., Inc. & Gulf States Utils. Co.*, 64 FERC ¶ 61,326 at 63,404-05, 1993 FERC Lexis 1947, at *4-5 (Sept. 22, 1993) (finding that FERC is not responsible for, and has no power to, enforce the antitrust laws). Thus, there is ***no possibility the FERC will award refunds, fines or penalties associated with anti-competitive behavior that would conflict with a damages award in the instant litigation.***

This is particularly true in the context of market-based rates where FERC has never approved any particular rate as "just and reasonable." Moreover, a "determination of what constitutes a 'just and reasonable rate' under [the FPA] does not necessarily resolve the issue of whether anticompetitive conduct occurred" under the Cartwright Act. *Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155, 1163-64 (S.D. Cal. 2001). Indeed, FERC acknowledged that it cannot "redress traumatic and inequitable circumstances like this" – let alone determine whether defendants conspired or colluded with other market participants or otherwise engaged in acts of unfair competition. *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121, 2000 FERC Lexis 2168, at *98.

Accordingly, antitrust enforcement against defendants' anticompetitive acts does not conflict with FERC determinations, but furthers the purpose of market-based rates, which is to ***ensure*** that consumers receive the full benefits of

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unreasonable rates may not be required prior to the refund effective date allowed in the Federal Power Act. As I have testified to Congress over the past two years, the Commission's options for additional remedies are very limited."); Pet. App. K (June 4, 2004, letter from FERC Chairman Pat Wood, III, to Rep. Rick Larsen). Notably, although FERC may still pursue profit disgorgement, such a remedy does not equate to antitrust damages.

effective competition. As the Ninth Circuit recently recognized under the FCA, state competition law complements, rather than conflicts with, agency oversight in a post-tariff environment and serves as a default norm:

> [W]hen Congress authorized the FCC to eliminate the [rate] filing requirement, it chose to replace the rate filing mechanism with a market-based mechanism. Unlike rate filing, this market-based method depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. This dependence creates a compl[e]mentary role between federal and state law under the 1996 Act.
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> [U]nder the [new] competition-based regime . . . , state law protections are no longer excluded as they once were under the express terms of the filed rate doctrine. ***In the post-tariff environment, we find no reason to imply a conflict between otherwise compl[e]mentary state and federal laws. In deregulated markets, compliance with state law is the norm rather than the exception.***

Ting v. AT&T, 319 F.3d 1126, 1141-43 (9th Cir. 2003), *cert. denied*, __ U.S. __, 124 S. Ct. 53 (2003).[21]

Because plaintiff challenges anticompetitive conduct and not whether defendants' rates were unjust or unreasonable under the FPA, plaintiff's action, based on laws of general application, is not an attempt to directly regulate rates. Courts readily distinguish between rate regulation on the one hand and antitrust damages for anticompetitive conduct on the other, recognizing that "relief could be granted without the district court's actually becoming involved in the process of setting rates."

21. Unfortunately, the Ninth Circuit's opinion here overlooks its ruling in *Ting*.

City of Mishawaka, 560 F.2d at 1321, 1323-24; *Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178-79 (8th Cir. 1982) (no antitrust immunity because claim targets anticompetitive conduct rather than the reasonableness of rates); *Groton v. Connecticut Light & Power Co.*, 456 F. Supp. 360, 367 (D. Conn. 1978) (notwithstanding FERC tariff reviews, "defendants exercise sufficient freedom of choice concerning the contents of the rate schedules to require them to take responsibility for the harmful consequences, if any, of their conduct"). *See also MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1105 (7th Cir. 1983) ("where, as here, . . . the FCC has neither dictated nor approved of [pricing] decisions, the challenged rate filings are not immune from antitrust scrutiny").

In this regard, the Ninth Circuit's decision also creates an irreconcilable conflict with the Fifth Circuit's decision in *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), where the court decided that it was empowered to reject or modify FERC jurisdictional contracts unless the claim directly "challenged a filed rate." *Id.* at 519-20. The Fifth Circuit thus concluded that courts could evaluate legal claims that, for example, would result in an increase in the quantity purchased under the contract, or even a voided contract, because such claims would "only have an indirect effect upon the filed rate." *Id.*[22]

Applying the *Mirant* standard here, plaintiff's claims survive because they do not challenge any FERC jurisdictional contracts or rates in light of FERC's elimination of the prior regulatory regime's requirement that defendants file contracts and that FERC approve those contract rates as "just and reasonable" under the FPA. Thus, an award here would not change a single FERC-approved contract or rate – whether directly or indirectly – rendering the Ninth Circuit's test in direct conflict with the standard provided in *Mirant*.

22. Even where FERC-approved rates are indeed at issue, *per se* preemption does not result (as the Ninth Circuit concluded) because damages can be calculated using the FERC-approved rate. *Id.* at 520.

The Ninth Circuit's additional conclusion that injunctive relief is preempted, Slip Op. at 13263, also directly conflicts with the Fifth Circuit's conclusion that courts "may set aside an energy contract that was obtained unconscionably or by fraud without interfering with FERC's rulemaking power, so long as that order was not based upon a theory that the filed rate was too high." *Id.* at 519 (citing *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987)). The rationale: such injunctive relief has only "indirect effects" on FERC-filed rates. *Id.* Again, the same conclusion applies here where FERC never approved any rates.

It is impossible to reconcile the Ninth Circuit's finding of conflict preemption with *MCI Communications*, *Mirant* and the other cases cited in this section. It is imperative that the Court accept review to resolve these conflicts, particularly in light of the legions of West Coast energy fraud cases that are currently being litigated in trial and appellate courts throughout the country.

D. An Award of Antitrust Damages Would Further, Rather Than Conflict With, FERC Oversight of Deregulated Electricity Markets.

Despite concluding, just one day before issuing the opinion challenged here, that FERC was "abdicating its regulatory responsibility" during the electricity crisis, *Lockyer*, slip. op. at 13136, the Court of Appeals held that FERC's oversight of the deregulated Western energy markets was sufficient to abrogate state law antitrust claims. Even assuming the Ninth Circuit's inquiry had some relevance to proper preemption analysis (and, as just demonstrated, it did not), an examination of the factors it relied on reveals that the relief sought by plaintiff complements, rather than conflicts with, FERC's regulatory regime.

The Ninth Circuit found that plaintiff's claims conflicted with three of FERC's supervisory mechanisms: (i) FERC's determination that defendants lacked market power at the time their authority to charge market-based rates was granted; (ii) FERC's requirement that defendants file *ex post* quarterly reports summarizing certain information about their activities in the markets; and (iii) FERC's approval of tariffs filed by the PX and ISO containing "protocols" intended to prevent the kind of market manipulations committed by defendants here. Slip. Op. at 13261-63. Yet, plaintiff's claims do not conflict with any of these oversight structures.

FERC's determination that sellers lacked market power when their market-based rates were granted years before the crisis does nothing to prevent sellers from colluding to violate market rules and exercise market power. *See* Phillip E. Areeda & Herbert Hovenkamp, FUNDAMENTALS OF ANTITRUST LAW, 499-500 (2003). In fact, during the crisis "the California energy market was subjected to market manipulation on a massive scale." *Lockyer*, slip op. at 13136. Antitrust enforcement actions help deter such collusion and therefore help ensure FERC's ultimate goal – that consumers benefit from just and reasonable rates produced by effective competition.

Nor do the quarterly informational filings required by FERC operate to preempt state competition law actions. On the contrary, these filings are just that – informational – and there is simply no way that a state court antitrust action can interfere with them. In any event, the Ninth Circuit concluded that, "despite the integral nature of the reporting requirements to an effective market-based tariff," there was a "patent failure of many of the affected companies to provide even minimal reporting." *Lockyer*, slip op. at 13137. Hence, there was no effective regulation in this instance, and there is now

no possibility of interference with that regulation, even if it had been effectively exercised.

Finally, the Ninth Circuit's assumption that a state-law remedy for anticompetitive conduct would necessarily interfere or conflict with FERC's enforcement of the ISO and PX market tariffs is unfounded. FERC is equally free to enforce its tariffs whether or not this lawsuit proceeds. State antitrust and unfair competition actions merely add an indispensable tool that consumers can use to ensure that they are protected from anticompetitive conduct.

* * *

In sum, state law claims can be preempted only by a clear showing of Congressional intent or the demonstration of an actual conflict with the regulatory regime. Whether "FERC is doing enough regulation" as postulated by the Ninth Circuit, Slip Op. at 13260, is simply irrelevant to this inquiry. The Ninth Circuit's conclusion that this action is preempted cannot be reconciled with a long line of decisions of this Court, numerous decisions of other circuits, and the underlying purposes of the FPA.

III. The Opinion Below Raises An Important And Unanswered Question — Whether The Filed Rate Doctrine And Preemption Can Apply In A Market-Based Regime.

In passing the FPA, Congress recognized that rational utilities with franchised monopolies had "the incentive and the power to set too high a price, produce too little, and appropriate gains that would have gone to consumers in competitive markets." McArthur, *Anti-trust in The New Deregulated Natural Gas Industry*, 18 ENERGY L.J. 1, 4 (1997). As a result, Congress directed tight rate regulation, which was done by *ex ante* agency review and approval of

rates or formulae from which rates could be ascertained. This structure necessarily engendered the expansive, largely post-New Deal Supreme Court decisions (and their progeny) that employed sweeping preemptive language, while simultaneously carving out a role for competition law.

But FERC's move to market-based tariffs abandoned the tightly regulated rate structure. Rates or formulae were not contained in filed tariffs, were established by private entities who were excused from establishing just and reasonable rates, were not reviewed by FERC before being charged, constantly fluctuated, and are not now subject to refund even if found by FERC *ex post* to be unjust or unreasonable. This new, deregulated approach, coupled with FERC's inability to enforce antitrust laws and refusal to order substantial refunds, leaves a huge regulatory vacuum notwithstanding FERC's general oversight powers. The Court of Appeals' omnibus preemption ruling magnifies that vacuum, ensuring no antitrust oversight of the wholesale electricity market.

The result is illogical and inconsistent with those decisions, cited above, providing that antitrust enforcement retains vitality in regulated industries notwithstanding the existence of extensive agency power. In the deregulated regime that FERC created, Congress could not have intended to limit relief to that authorized solely by the FPA to the exclusion of state unfair business practice laws that safeguard against anti-competitive and deceptive business practices. As even FERC has recognized, "[t]he legislative history [of the FPA] indicates that Congress never contemplated a market scenario such as the one here." *San Diego Gas & Elec. Co. v. Sellers*, 97 FERC ¶ 61,275, 2001 FERC Lexis 3018, at *52 n.50 (Dec. 19, 2001).

In newly deregulated markets, enforcing competition laws is crucial. As the Federal Trade Commission Chairman

testified in discussing the role of antitrust enforcement in the era of electricity deregulation: "Vigilant antitrust enforcement is an essential component of a market economy, especially in the formative years after the regulatory grasp is loosened." ER 667 (Statement by Robert Pitofsky, Chairman, Federal Trade Commission, 105th Congress, First Session (June 4, 1997), at 12). Echoing the same refrain, the Department of Justice opined that antitrust enforcement is crucial in newly deregulated markets because, based on past experience, participants in newly competitive markets are greatly tempted to engage in anticompetitive conduct:

> Antitrust enforcement will play a large role as we move to a competitive market. As our experience with deregulation and a variety of industries over the past two decades shows, when we seek to end pervasive government regulation and make room for competitive market forces . . . ***we can also anticipate increased temptation, at the very least, on the part of utilities to resort to anticompetitive schemes***, to ease competitive pressures posed by the new market-based environment. ***It is critically important to have an active and sound antitrust enforcement policy to help ensure a successful transition to competition.***

ER 667-68. (Statement of Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice 105th Congress, First Session (June 4, 1997), at 12-13 (emphasis added)).

Other commentators have made similar observations:

> Recently, deregulation of the electric and gas industries has fostered a larger role for the antitrust laws. . . . Although over time many aspects of the

> electricity and natural gas markets will be governed by competitive forces instead of regulation by the FERC or the state commissions, this does not mean that the industry will be "unregulated." The competitive aspects of the energy industry will be "regulated" like all competitive markets – by the antitrust laws.

Ray S. Bolze, John C. Peirce & Linda L. Walsh, *Antitrust Law Regulation: A New Focus for a Competitive Energy Market*, 21 ENERGY L.J. 79, 80 (2000).

Despite the forecast of lower, market-based rates that would result from a competitive market, the California energy market was subjected to artificial manipulation on a massive scale leading to grossly inflated prices. In the current deregulated market, with FERC abdicating much of its regulatory responsibility, policing the market through state and federal antitrust law is more important than ever. Congress could not have intended otherwise, and the Court of Appeals wrongfully found that plaintiff's claims were preempted. It is crucial that the Court accept review and reinforce the importance of competition law in deregulating markets, particularly given FERC's strategic plan to accelerate deregulation notwithstanding the "spectacular failures of the electricity markets it previously approved." Gerald Norlander, *May the FERC Rely on Markets to Set Electric Rates*?, 24 ENERGY LAW JOURNAL 65 (2003).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 10, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55191

D.C. No. CV-02- 01993-RHW

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a municipal corporation in the State of Washington,

Plaintiff-Appellant,

v.

DYNEGY POWER MARKETING, INC.; Reliant Energy Services, Inc.; Sempra Energy Trading Corp.; Sempra Energy Resources; Mirant Corporation; William Energy Marketing & Trading Company; Powerex Corporation; XCEL Energy, Inc.; NRG Energy, Inc.; Cabrillo Power I, LLC; Cabrillo Power II, LLC; El Segundo Power LLC; Long Beach Generation, LLC; PG & E Energy Trading Holding Corporation; Duke Energy Trading and Marketing LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Robert H. Whaley, District Judge, Presiding

Appendix A

Argued and Submitted
June 14, 2004—San Francisco, California

Filed September 10, 2004

Before: Mary M. Schroeder, Chief Judge,
William C. Canby, Jr., and Richard C. Tallman,
Circuit Judges.

Opinion by Chief Judge Schroeder

OPINION

SCHROEDER, Chief Judge:

This litigation arises out of the California Energy Crisis of 2000-01, when shortages of power and high electricity prices caused blackouts and general turmoil in the electricity markets of the west coast. In this case, Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"), a utility providing electricity to consumers in Washington state, has sued various generators and traders of wholesale electricity for violations of California state antitrust and consumer protection laws. Snohomish charges that the defendants manipulated the market and restricted electricity supplies in order to cause artificially high prices in the market from which Snohomish purchased power. Snohomish seeks treble damages and injunctive relief.

The district court held that the claims were preempted by federal law, which authorizes the Federal Energy Regulatory Commission ("FERC") to set wholesale

electricity rates. Snohomish appeals, contending that FERC's policy of setting rates in accordance with market forces amounts to an abdication of rate making. Because FERC has exclusive jurisdiction over interstate sales of wholesale electricity, and continues to engage in regulatory activity, we affirm. *See California v. Dynegy, Inc.*, 375 F.3d 831, 850-853 (9th Cir. 2004); *Pub. Utility Dist. No. 1 of Grays Harbor County Washington v. Idacorp, Inc.*, __ F.3d __, __ (9th Cir. Aug. 10, 2004), Slip Op. at 10911-10919.

BACKGROUND

Before 1996, FERC reviewed electricity rates that were cost-based. The primary factor in setting the rate was the cost of producing and transmitting the electricity. Power suppliers proposed rates by adding up their costs and accounting for an expected rate of return. FERC reviewed and approved tariffs that contained detailed breakdowns of costs and specified rates of return. *See* 18 C.F.R. § 35.1(a) (requiring utilities to file "rate schedules"); 18 C.F.R. § 35.2(b) (defining what information must be included in a "rate schedule"); 18 C.F.R. § 35.13(h)(22) (requiring utilities to state their expected rate of return). Utilities were also required to give a thorough explanation of "how the proposed rate or charge was derived." 18 C.F.R. § 35.12(b)(2)(i). These rate schedules had to be filed at least 60 days before the utility could charge the requested rate, and the rate could be implemented only after FERC approved it. *See* 18 C.F.R. §§ 35.2(e), 35.3(a). After a rate was approved, a utility could charge only the filed rate until a request to change the rate was submitted and approved by FERC. 16 U.S.C. § 824d(d); 18 C.F.R. § 35.13.

Appendix A

In 1996, California changed this cost-based system of setting wholesale electricity rates to a market-based system, where the rate was determined in a structured market. The California legislature passed Assembly Bill 1890, Cal. Pub. Util. Code § 330 *et seq.*, in an effort to reduce the price of electricity by replacing cost-based rate regulation with rates that were determined by competitive forces. *See California v. Dynegy, Inc.*, 375 F.3d at 835; *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1045 (9th Cir. 2001). The legislation created two non-governmental entities to operate markets and otherwise manage the sale of electricity: the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). These entities were subject to FERC's regulation. *Dynegy*, Slip Op. at 8836.

The PX operated a market for the purchase and sale of electricity in the "day-ahead" and "day-of" markets. The price in these markets was set by evaluating bids submitted by market participants. A seller could submit a series of bids that consisted of price-quantity pairs representing offers to sell (e.g. 5 units at $50 each, but 10 units if the price is $100 each). Similarly, a buyer could submit a series of bids that consisted of price-quantity pairs representing offers to buy. The PX would then establish aggregate supply and demand curves and set the "market clearing price" at the intersection of the two curves. Then every exchange would take place at the market clearing price, even though some buyers had been willing to pay more and some sellers had been willing to sell for less.

Appendix A

The ISO managed the transmission network, managing imbalances between supply and demand and maintaining the reliability of the transmission grid. As part of these responsibilities, it operated a "real-time" or "spot" market used to balance supply and demand at precise points in time. For example, if customer demand for a particular hour was not met, then the ISO was required to procure power on the spot market to maintain the stability of the grid. In the markets the PX and ISO managed, rates for wholesale electricity rose dramatically during 2000 and 2001. This caused consumer utilities to pay record high prices to traders and generators.

FACTUAL AND PROCEDURAL HISTORY

In this suit, Snohomish alleges that the defendants violated the Cartwright Act, Cal. Bus. & Prof. Code § 16720 *et seq.* (California's antitrust law), and California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* The defendants are all generators and traders who sold electricity in the California wholesale market. (The proceedings against one defendant, PG & E Energy Trading Holding Corp., is under a bankruptcy court stay.) Snohomish alleges that the defendants withheld supply, waited until emergency conditions were declared and prices rose, and then offered their supply at the higher prices. Snohomish also alleges that the defendants engaged in a variety of sham transactions in order to manipulate and inflate prices. These transactions had colorful names like "Death Star" and "Get Shorty."

The consumer utilities that were the buyers in the California wholesale markets have instituted proceedings before FERC on these matters. FERC has investigated the

defendants' practices, and issued an order that describes the market manipulation techniques Snohomish alleges, analyzes whether these practices violate any of the tariffs filed with FERC, and outlines appropriate remedies. *See Am. Elec. Power Serv. Corp. et al.*, 103 FERC ¶ 61,345, 2003 WL 21480252, 9 (Jun. 25, 2003). The order provides a detailed discussion of the practices challenged here.

Snohomish's complaint alleged these practices caused Snohomish "to pay prices for electricity in excess of rates that would have been achieved in a competitive market." Snohomish asked the district court to enjoin the defendants from engaging in unlawful and unfair business acts, order the defendants to disgorge all monies wrongfully obtained, order the defendants to pay restitution, award compensatory and treble damages, and award costs, interest, and attorney's fees.

The district court granted the defendants' motion to dismiss, ruling under three alternative but related theories that it did not have jurisdiction to resolve the issues raised in Snohomish's complaint. The district court ruled that Snohomish's claims were barred by both the filed rate doctrine and by principles of field and conflict preemption. *See Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 929-30 (9th Cir. 2002) (describing the filed rate doctrine); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (describing the doctrines of field and conflict preemption and citing cases). The district court held that granting the relief Snohomish requested would interfere with FERC's exclusive jurisdiction over the regulation of interstate wholesale energy rates because Snohomish sought damages

stemming from the difference between the rates the defendants charged and hypothetical rates that, according to the complaint, would have "been achieved in a competitive market." Snohomish appealed.

DISCUSSION

Snohomish argues that the preemption doctrines, upon which the district court relied, should not apply when market-based rates are involved because the market, and not FERC, is determining the rates. The fundamental question in this case is whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws. The answer to this question is controlled by two recent decisions of this court: *Dynegy*, 375 F.3d 831, and *Grays Harbor*, __ F.3d __. Under the system at issue here, FERC has waived many of the requirements that applied under the cost-based system. For example, the actual prices are no longer filed with FERC 60 days before they can be charged and the utilities do not provide FERC with detailed schedules of their costs. Instead, the price of wholesale electricity is determined in the markets operated by the PX and the ISO.

FERC continued to oversee wholesale electricity rates, however, by reviewing and approving a variety of documents filed by the defendants, the PX, and the ISO. First, each seller was to file a market-based umbrella tariff, which "preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so." *California v. British Columbia Power Exchange Corp.* ("*BC Power Exchange I* "), 99 FERC ¶ 61,247, 2002 WL 32035504, 13

(May 31, 2002). FERC approved these market-based tariffs only upon a showing that the seller lacked or had mitigated its market power. *Id.* at *11; *see also La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). The theory is that a seller cannot raise its price above the competitive level without losing substantial business to rival sellers unless the seller has market power, and therefore that FERC's determination that a seller lacks market power provides a "strong reason to believe" that sellers will be able to charge only just and reasonable rates. *See Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993) (discussing the Natural Gas Act).

Second, FERC required each seller to file quarterly reports, which contained certain required information including the minimum and maximum rate charged and the total amount of power delivered during the quarter. FERC has found this requirement necessary to ensure that rates will be on file as required by FPA § 205(c), 16 U.S.C. § 824d(c), to allow FERC to evaluate the reasonableness of the charges as required by FPA § 205(a), 16 U.S.C. § 824d(a), and to allow FERC to continually monitor the seller's ability to exercise market power. *BC Power Exchange I*, 99 FERC ¶ 61,247, 2002 WL 32035504, at *12.

Third, FERC reviewed and approved detailed tariffs filed by the PX and the ISO, which described in detail how the markets operated by each entity would function. Many of the rules governing market operations were originally submitted by the PX and the ISO for information purposes only, but FERC required that these protocols be filed with and approved by the Commission as part of the PX and ISO

tariffs. *Am. Elec. Power Serv. Corp. et al.*, 103 FERC ¶ 61,345, 2003 WL 21480252, at *9. Each participant in the PX and the ISO markets was required to sign an agreement acknowledging that the tariff filed by either the PX or the ISO would govern all transactions in that market.

After the energy crisis unfolded, FERC ordered wholesalers to disgorge profits that resulted from the kinds of practices Snohomish has alleged here. FERC found that many of these practices were prohibited by the protocols that were filed as part of the PX and ISO tariffs. *See generally Am. Elec. Power Serv. Corp. et al.*, 103 FERC ¶ 61,345, 2003 WL 21480252.

This court has rejected Snohomish's argument that the preemption-related doctrines at issue do not apply when market-based rates are involved. *Grays Harbor*, __ F.3d at __, Slip Op. at 10911-10919. In *Grays Harbor*, we were confronted with issues that are nearly identical to those involved here. *Id.* at 10909 n.3. The plaintiff in that case brought state-law contract claims against a company that sold wholesale electricity seeking rescission and reformation of a contract that was entered into at the height of the energy crisis when wholesale electricity prices were near their peak. The plaintiff alleged that the high prices were the result of market manipulation and asked the court to afford relief after determining "a price that reflects a fair price absent dysfunction, manipulation and the intentional withholding of electric power. . . ." *Id.* at 10909. Our court concluded that the same three preemption-related doctrines that the district court relied on here required the dismissal of the claims in *Grays Harbor.* We concluded that the district court

was precluded from giving the plaintiff the relief it sought because, to award that relief, the district court would have had to determine a "fair price." *Id.* at 10913. We held that this would interfere with FERC's exclusive jurisdiction to set wholesale rates and was therefore barred by field preemption, conflict preemption, and the filed rate doctrine. *Id.* at 10913, 10916, 10917, 10919.

Snohomish's claims in this case allege violations of state antitrust and unfair competition law rather than the state contract law claims involved in *Grays Harbor*, but Snohomish's claims also ask the district court to determine the rates that "would have been achieved in a competitive market." This is the same determination as the "fair price" determination that we held was barred by preemption principles in *Grays Harbor.* We therefore hold that Snohomish's claims are barred by the filed rate doctrine, by field preemption, and by conflict preemption.

Snohomish also requests injunctive relief, but our court has also held that this relief is barred by the filed rate doctrine and preemption principles. *California v. Dynegy*, Slip Op. at 8863-68. In *Dynegy*, we held that the State of California's claims for violations of California's unfair competition law, Cal. Bus. & Prof. Code § 17200 *et seq.*, which included a claim for injunctive relief, were barred. *Id.* at 8839, 8863-67. We said: "remedies for breach and non-performance of FERC-approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC." *Id.* at 8865-66. Here, FERC approved tariffs that included the market protocols that governed sales in the PX and ISO markets. FERC has found that most, if not all, of

the practices alleged in Snohomish's complaint violated these protocols. *Am. Elec. Power Serv. Corp. et al.*, 103 FERC ¶ 61,345, 2003 WL 21480252. Snohomish's claim for injunctive relief is therefore preempted. It "encroach[es] upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy." *See Dynegy*, Slip Op. at 8866 (citations omitted).

FERC approved tariffs that governed the California wholesale electricity markets. Therefore, if the prices in those markets were not just and reasonable or if the defendants sold electricity in violation of the filed tariffs, Snohomish's only option is to seek a remedy before FERC. We therefore affirm the district court's order dismissing Snohomish's claims for lack of jurisdiction.

AFFIRMED.

APPENDIX B — ORDER GRANTING MOTIONS TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA DATED JANUARY 6, 2003 AND FILED JANUARY 7, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 02-CV-1993-RHW
No. MDL 1405

IN RE CALIFORNIA WHOLESALE ELECTRICITY ANTITRUST LITIGATION

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,

Plaintiff,

v.

DYNEGY POWER MARKETING, INC., et al.,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

Before the Court is Defendant Powerex Corporation's Motion to Dismiss and Motion to Strike (Ct. Rec. 3) and Defendants' Motion to Dismiss Complaint (Ct. Rec. 12).[1] A hearing was held on December 19, 2002 in San Diego, California. Plaintiffs and Defendants were present and represented by counsel.

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1. The second motion-Motion to Dismiss Complaint-is brought by a group of eight other Defendants besides Powerex.

Appendix B

BACKGROUND

Defendants' motions for dismissal are premised on the "filed-rate doctrine" and federal preemption principles. In order to resolve these legal issues; however, it is important to detail the rather complex factual context in which they arise.

A. California's Deregulated Energy Market

Plaintiff Public Utility District No. 1 of Snohomish County ("Snohomish") brings the current lawsuit seeking money damages and injunctive relief for prices charged by the Defendants, a group of energy sellers, for sales of electricity made in the deregulated California energy market in the year 2000. A proper determination of the validity of Plaintiff's claims hinges on an understanding of the nature and operation of California's deregulated energy market.

In the mid-1990s, California moved to deregulate its energy markets. *See* California Assembly Bill 1890 (AB 1890). In restructuring its energy markets, California sought to separate utilities' vertically-integrated generation, transmission, and distribution functions with a framework under which competition would be allowed in the supply of electric power. This new scheme replaced the regulation of retail rates based upon cost and reasonable rate of return with competitively determined "market-based rates." Theoretically, deregulation was supposed to allow the free market to set electricity prices, rather than relying on cost-based rates set through regulation.

Appendix B

This restructuring involved the creation of two new non-governmental corporations to coordinate the transmission and sale of electricity; the Independent System Operator ("ISO") and the California Power Exchange ("PX"). These entities were organized under California law, but regulated by the Federal Energy Regulatory Commission ("FERC"). Pursuant to deregulation, the price of energy was no longer set by regulators, but, rather, determined through competitive auctions administered by the PX. The PX operated a continuous state-wide auction, matching bids for sale and purchase of wholesale electricity.[2] The PX matched supply bids with requirements for the delivery of electricity, as expressed by demand bids from buyers. The ISO operated the electrical grid for the State of California and purchased electricity as needed to assure system reliability. If customer demand was not met by the PX, then the ISO was required to procure power to maintain the stability of the grid.

In order for the PX and ISO to become operational, FERC was required to approve certain filings by the PX and ISO. In particular, the ISO and PX filed tariffs with FERC, and FERC reviewed and approved those tariffs as an appropriate means of achieving "just and reasonable" rates before authorizing the PX and ISO markets to operate. These tariffs comprised the rules for trading in the California wholesale electricity markets. Every participant in the market had to formally bind itself to comply with those tariffs. It is the alleged, ensuing manipulation of this new deregulated scheme that forms the basis of Plaintiff's complaint.

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2. The PX is no longer operational.

Appendix B

B. Allegations in the Complaint

Plaintiff's complaint seeks redress for alleged unfair business practices and market manipulation of the wholesale energy market by the Defendants. (Ct. Rec. 1.) More specifically, Plaintiff "alleges that defendants unlawfully manipulated the market for electric energy by fixing prices and restricting supply into the markets operated by the [PX] and the [ISO], or by engaging in other conduct for the purpose of artificially inflating the price of electricity and/or charging unlawful prices for such electricity." *Id.* In ¶ 6 of its complaint, Plaintiff further alleges that it has been "forced to pay prices for electricity *in excess of rates that would have been achieved by a competitive market.*" *Id.* (emphasis added).

Plaintiff brings a cause of action for violation of the California antitrust law ("Cartwright Act") and a cause of action for violation of California's Unfair Competition Law ("UCL"). *Id.* As to the state antitrust claim, Plaintiff alleges that Defendants "gamed" the market, which resulted in "wholesale energy being sold at prices that far exceed the price which energy would be sold in a truly competitive market." *Id.* In relation to Plaintiff's UCL claim, it alleges "defendants never filed their rates ... with" the result of which "deprived the public ... notice and information necessary to make informed decisions about rates." *Id.*

Of particular import to the current motion is the relief sought by Plaintiff in its complaint. Specifically, Plaintiff asks the Court to "enjoin the defendants from continuing to conduct business via the unlawful and unfair business acts

or practices described herein," to order the Defendants "to disgorge" all monies wrongfully obtained, and to order the Defendants "to pay restitution to restore to plaintiff all funds acquired by means of any act or practice declared by this Court to be an unlawful or unfair act or practice." *Id.*

C. Ongoing FERC Proceedings

Currently, there are several cases pending before FERC regarding matters similar, if not identical, to those initiated by Plaintiff in this Court. There are pending Section 206 proceedings at FERC filed by San Diego Gas & Electric, in which FERC is investigating whether refunds should be ordered for sales into the California wholesale energy markets. *See SDG & E v. Sellers*, 92 F.E.R.C. ¶ 61,172 (2000). FERC is also conducting a broad investigation into whether any seller of electricity in the California wholesale markets manipulated, or "gamed," those markets. *See Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). Related proceedings have been brought with respect to the Pacific Northwest markets. *See Puget Sound Energy v. Sellers*, 96 F.E.R.C. ¶ 63,044 (2001). Lastly, Snohomish itself has apparently filed two complaint proceedings with FERC concerning long-term power supply contracts that it executed with two suppliers. *See Nevada Power Co. and Sierra Pac. Power Co. v. Duke Energy Trading & Mktg., L.L.C., et al.*, 99 F.E.R.C. ¶ 61,047 (2002) (consolidated proceedings).

Appendix B

DISCUSSION

As noted, Defendants assert two related, but separate, grounds in support of their motions to dismiss Plaintiff's claims; the filed rate doctrine, and federal preemption. The validity of each of these principles as justification for dismissal is addressed, in turn, below.

I. The Filed Rate Doctrine

Defendants' motions to dismiss require the Court to consider the application of the "filed rate doctrine" to Plaintiff's state law claims. The filed rate doctrine has a long history in federal law, but here, it is being asserted in a contemporary regulatory context, which offers some new twists to its otherwise rather straightforward application. As noted above, the key feature of California's recently deregulated wholesale energy markets is the markets' reliance on "market-based rates." These rates are still subject to FERC oversight, but to a much lesser extent than traditional "cost-based rates." Thus, the determinant question in this case in regard to the application of the filed rate doctrine is whether the doctrine applies to the relatively new innovation of "market based rates" governing wholesale energy trading.

A. Contours of the Filed Rate Doctrine

The filed rate doctrine has its roots in the Federal Power Act ("FPA") itself. *See generally* Federal Power Act, §§ 1 *et seq.*, 321 as amended, 16 U.S.C.A. §§ 792 *et seq.* Under the FPA, regulatory jurisdiction over electricity is divided into two components: states have regulatory authority over

intrastate retail sales of electricity, and the federal government has exclusive jurisdiction over interstate, wholesale sales. Thus, in the FPA, Congress drew "a bright line easily ascertained between state and federal jurisdiction . . . [t]his was done in the Power Act by making [FERC] jurisdiction plenary and extending to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). The "bright line" division of authority adopted by Congress precludes any attempt to inject state law into areas reserved to FERC. Where FERC has jurisdiction, that jurisdiction is exclusive. *See Public Utils. Comm'n of California v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) ("Here, if there be Commission jurisdiction over some component of the transaction, it is exclusive over the component.").

Section 824e(a) of the FPA vests exclusive jurisdiction over interstate wholesale electricity rates and practices affecting such rates with FERC.[3] *See* 16 U.S.C. § 824c(a). FERC's exclusive jurisdiction extends not only to rates *per se*, but also to "any rule, regulation, practice or contract affecting such" rates. 16 U.S.C. § 824e(a).

The filed rate doctrine, in the electricity context, results from FERC's responsibility for setting and ensuring compliance with just and reasonable rates of wholesale

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3. Section 824e(a) states, in pertinent part, that FERC "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." *See* 16 U.S.C. § 824e(a).

electricity sale and transmission.[4] *See Pacific Gas & Elec. v. Lynch*, 216 F. Supp. 2d 1016, 1033 (N.D. Cal. 2002). The filed rate doctrine arises from the sum of these concepts, and holds that electricity generators who file their rates with FERC, as they are required to do by law, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing a rate other than that filed with FERC. Because the filed rate doctrine is a product of federal regulatory jurisdiction staked out in the Federal Power Act, judicial enforcement of the filed rate doctrine is "a matter of enforcing the Supremacy Clause." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986).

Thus, under the filed rate doctrine, "[a] State must . . . give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the State do not interfere with this authority." *Id.* at 966. Moreover, courts, both state and federal, are prohibited from considering any rate other than that filed with FERC to be the appropriate wholesale rate. *Lynch*, 216 F. Supp. 2d at 1033. As such, "[t]he filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992).

Given the exclusive jurisdiction of FERC over the PX and ISO wholesale markets, Defendants argue that Plaintiff's claims are barred because they "go to the heart of the filed rate

4. Judge Walker's opinion in *Lynch* contains a comprehensive and in-depth discussion regarding the history and genesis of the filed rate doctrine.

doctrine." Defendants maintain that the Court should apply the doctrine to dismiss the Plaintiff's claims because, in order to resolve those claims, the Court would have to do precisely what the doctrine forbids, namely, set a rate different from that chosen by FERC.

The Court agrees with Defendants-the filed rate doctrine indeed bars Plaintiff's claims. As the Ninth Circuit stated in *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 863 (9th Cir. 1997), "the filed rate doctrine bars all claims-state and federal-that attempt to challenge a rate that a federal agency has reviewed and filed." Moreover, the Ninth Circuit has made clear that "the filed rate doctrine [prohibits] not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC." *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 929-30 (9th Cir. 2002).

Plaintiff's claims ask the Court to do exactly that. The allegedly improperly inflated rates paid by Plaintiff are those that resulted from the tariffs filed and approved by FERC. In its complaint, Plaintiff asserts that absent Defendants' improper conduct and anti-competitive acts, it would have paid different rates. As such, Plaintiff specifically seeks as redress the difference between the charged rates and the different, hypothetical rates it believes would have "been achieved in a competitive market." (Ct. Rec. 1.) Thus, in order to resolve Plaintiff's claims and provide it the damages it seeks, the Court would be expressly required to assume "a hypothetical rate different from that actually set by FERC." *Transmission*, 295 F.3d at 929-30. This, the Court cannot do.

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Each of the causes of action brought by Plaintiff require the Court to make this impermissible determination. As to Plaintiff's antitrust claims, Plaintiff seeks monetary compensation for "overcharges." The filed rate doctrine bars this claim because the Court would presumably have to measure the difference between the allegedly fixed wholesale price and an otherwise "just and reasonable" wholesale price. Indeed, the Ninth Circuit's decision in *County of Stanislaus* compels this conclusion. There, the plaintiff alleged that the "defendants' FERC-approved rates were the product of antitrust violations, and [sought] as damages the 'overcharge' that resulted from the fixed prices." *County of Stanislaus*, 114 F.3d at 863. The Ninth Circuit held, however, that such a claim was "precisely what the filed rate doctrine prohibits." *Id.*

The same result obtains concerning Plaintiff's UCL claims. Plaintiff alleges that Defendant engaged in "unlawful, fraudulent, or unfair business practices," which requires Defendants to provide "restitution to plaintiff for all funds unlawfully, unfairly or fraudulently obtained" as a result of Defendants' violations of the UCL. (Ct. Rec. 1.) Plaintiff also claims that the Court should order Defendants to "[d]isgorge all revenues and profits acquired as a result of the unlawful business acts or practices." *Id.* Thus, to resolve this claim as well, the Court would be obliged to determine what level of disgorgement and restitution is appropriate, which, in turn, would require it to essentially determine what a "just and reasonable" rate would have been had Defendants not engaged in the alleged behavior. Such a determination, however, lies within the exclusive province of FERC, as the filed rate doctrine applies to any "state law causes of action

relating to rates established by federal agencies."[5] *County of Stanislaus*, 114 F.3d at 863 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981)).

Finally, the filed rate doctrine operates to bar the portion of Plaintiff's prayer for relief that asks the Court to order Defendants to "immediately cease all acts of unlawful and unfair competition and enjoin defendants from continuing to conduct business via the unlawful and unfair business acts or practices described herein." (Ct. Rec. 1.) Plaintiff's request for injunctive relief seeks to enjoin conduct subject to the tariffs filed with FERC. The FERC tariffs govern the operation of the California wholesale energy markets and, in essence, the "unlawful conduct" and "unfair business acts" that form the gravamen of Plaintiff's complaint. Issuance of the injunction sought by Plaintiff would impose judicial oversight of all Defendants' actions, thereby effectively changing the rules established by FERC for participating in these markets. The filed rate doctrine bars this result. *See Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) (holding injunctive relief barred by filed rate doctrine because relief sought by plaintiff interfered with tariffs filed with FERC).

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5. Although not binding authority, the Court notes that in *Day v. AT & T Corp.*, 63 Cal. App. 4th 325, 336 (1998), the California Court of Appeals held, in a case involving claims brought under the UCL challenging rates that had been filed by common carriers with the Federal Communications Commission, that "[a] claim attacking rate practices made public in the filed tariff schedules asks this court in involve itself in the rate-making process, which it cannot do." Further, the court held that plaintiffs "may not seek to recover any money from respondents, whether they label their request one for *disgorgement* or otherwise." *Id.* at 337 (emphasis added).

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B. The Filed Rate Doctrine's Application In Regard to FERC's Market-Based Rates Scheme

Plaintiff attempts to avoid the determination that the filed rate doctrine bars its claims by attacking the doctrine's application to FERC's modern market-based rate scheme employed in California's deregulated energy market. Plaintiff maintains that the filed rate doctrine does not apply in this scenario because the doctrine only bars claims that challenge rates specifically identified by tariff. Because the filed rate doctrine supposedly is to be construed narrowly, and under a market-based rate system, FERC does not review and approve rates *before* they are charged, Plaintiff claims the filed rate doctrine has no application here. Plaintiff argues that the doctrine does not apply because the FERC filings at issue do not include all the information required in traditional cost-based or formula-based rate filings. In any event, Plaintiff also maintains that the doctrine is inapplicable because Defendants obtained waivers of the FERC filing requirements. As the following discussion reveals, however, Plaintiff's arguments are not persuasive.

As an initial matter, the Court notes that Plaintiff mischaracterizes FERC oversight in the market-based rate scheme. Contrary to Plaintiff's assertions that FERC does not approve the rates charged in advance, FERC in actuality accomplished this review via the tariffs it approved.

As a regulatory agency, FERC has wide discretion to permit different types of tariffs. *See, e.g., Farmer's Union Cent., Exch., Inc. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984) ("FERC is not required to adhere rigidly to a cost-

based determination of rates"). As a result, in the case of wholesale electricity, FERC authorized the establishment of tariff-based market mechanisms for pricing power. Yet, the rates paid by wholesale buyers remained subject to FERC jurisdiction, and subject to FERC review. While Defendants do not file specific rates with FERC prior to selling power, they sell pursuant to the terms, conditions, and formulas established by the PX and ISO tariffs. As previously noted, FERC approved those tariffs as a means of achieving "just and reasonable" rates in advance of authorizing the PX and ISO markets to operate. As such, the filed rate doctrine applies to bar claims challenging the rates set by FERC in a market-based rate system.

Most damning to Plaintiff's arguments is the simple fact that case law does not support its contentions that the market-based rate system circumvents the filed rate doctrine. This argument-that the introduction of a market-based rate system skirts the reach of the filed rate doctrine-has been uniformly rejected by the courts. For instance, in *Town of Norwood*, the court rejected plaintiff's argument that "the filed rate doctrine should not apply where the 'regulated' rates have been left to the free market." 202 F.3d at 419. Instead, the court held that where rates are determined in a regulated market, "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review." *Id.*

Even more on point is Judge Walker's opinion in *Lynch*. There, the court addressed the filed rate doctrine in the same context as presented here — in regard to the market-based rate scheme central to California's deregulated wholesale

energy market. The court held "despite . . . the unique features of the regulatory context underlying the instant dispute, the court finds that the filed rate doctrine applies here in much the same way as it does under a cost-of-service regime." *Lynch*, 216 F. Supp. 2d at 1038. Likewise, in *Campbell v. San Diego Gas & Electric Co.*, 2001 WL 1860381 (E.D. Wash. 2001), this Court plainly rejected the contention that the filed rate doctrine does not apply to market-based rates.

As a result, Plaintiff's additional assertion that the filed rate doctrine does not apply because the FERC filings do not include all the information required in cost-based or formula-based rate filings must be rejected. With market-based rates, FERC assures "just and reasonable" rates through a market analysis, which necessitates independent filing requirements for the market-based tariff system. Nothing in the Federal Power Act supports the assumption that because certain elements are necessary in a cost-based or formula-based rate tariff, they must also be found in the market-based system. As noted by Judge Walker in *Lynch*, "passing fashions in regulatory schemes of the day cannot rework the structure of the regulation established by Congress in the FPA." 216 F. Supp. 2d at 1039. FERC has the authority to vary the oversight it wishes to employ depending on the type of rate used. As long as power generators file the information required by FERC, the filed rate doctrine is satisfied.

Lastly, the Court rejects Plaintiff's argument that the filed rate doctrine does not apply here because Defendants supposedly "waived" the FERC filing requirements. Rather, FERC appears to have only granted Defendants a waiver as to regulations used to determine cost-based rates under the

Code of Federal Regulations. Since Defendants sold power pursuant to market-based rates, the requirements for cost-based rates were unnecessary and, thus, FERC waived them. This waiver does not jeopardize application of the filed rate doctrine here.

In sum, the filed rate doctrine protects FERC's decisions as to what constitutes a "just and reasonable" rate under a market-based rate system. Plaintiff's complaint cannot be characterized as anything but a direct attack on rates or an attack on matters underlying wholesale electricity rates, nor can the relief it requests be granted without affecting the terms, conditions, and rates for wholesale electricity. As such, the Court finds that the filed rate doctrine bars Plaintiff's claims.

II. Federal Preemption

The second ground for dismissal raised by Defendants rests on the doctrine of federal preemption. Defendants maintain that the relief Plaintiff seeks-monetary relief to reduce past rates, and injunctive relief to regulate future conduct in the wholesale electricity market-cannot be granted without interfering with exclusive federal authority over wholesale power transactions.

From the outset, it is important that the Court differentiate between the different types of preemption that exist under the law. Defendants base their motion on a substantive preemption analysis-forwarding both field and conflict preemption as a defense to Plaintiff's claims-and do not rely on jurisdictional preemption, as discussed by this

Court previously in *Hendricks v. Dynegy Power Marketing, Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001). In *Hendricks*, the Court dealt with the question of whether Congress intended the Federal Power Act to completely occupy the field of energy production and distribution so as to convert the plaintiff's state law claims to a federal claim for purposes of removal jurisdiction. *Id.* at 1158. That issue is distinct from the question raised here by Defendants: whether the Federal Power Act functions as a preemption *defense* to Plaintiff's substantive claims.

"[T]he Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Thus, in regard to a substantive preemption analysis, federal law may pre-empt state law in three different ways. First, Congress may preempt state law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemption may be inferred when federal regulation in a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, preemption may be implied when state law actually conflicts with federal law. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hines v. Davidowitz, 312 U.S. 52, 67 (1941). It is the last two forms of preemption listed-field preemption and conflict preemption-that Defendants raise as grounds for dismissal here.

A. Field Preemption

Defendants maintain that field preemption operates to bar Plaintiff's claims because, through the Federal Power Act, Congress occupied the wholesale portion of the field of electricity rate regulation. Accordingly, Defendants assert that Plaintiff's claims are preempted because it seeks state judicial action within this field.

Federal courts have held that "[t]hrough the FPA, Congress preempted states, state courts, and even federal courts from acting in areas reserved exclusively for the FERC." *See Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1470 (5th Cir. 1987). As previously discussed, the FPA gives the FERC exclusive jurisdiction over interstate wholesale electricity rates. *See* 16 U.S.C. §§ 824-824e. The FPA permits utilities to charge only just and reasonable rates and to file their rates with the FERC. 16 U.S.C. §§ 824d(a-c). FERC may review the filed rates and, if it finds a rate to be unjust or unreasonable, it may fix a just and reasonable rate. 16 U.S.C. §§ 824e(a). Therefore, under the FPA, a buyer or seller of electricity may not sue in court to change the filed rate for any reason. *See e.g.*, *Montana-Dakota Utilities Co. v. Northwestern Pub., Serv. Co.*, 341 U.S. 246, 250 (1951) (under "filed rate doctrine," court may neither adjudicate whether rate is reasonable nor replace filed rate with more reasonable one).

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If the federal government occupies a field, or an identifiable portion of it, any state regulation or state court action within the same, select area is necessarily preempted. The Supreme Court made this point clear in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, stating:

> State . . . regulation is not preempted only when it conflicts with federal law. . . . When the federal government completely occupies a given field or *an identifiable portion of it*, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

461 U.S. 190, 212-213 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)) (emphasis added). The metaphor "occupy the field" is strongly associated with, and often taken to automatically entail, exclusive federal control. *See Public Util. Comm'n of California v. FERC*, 900 F.2d 268, 274 (D.C. Cir. 1990).

Consequently, the fact that FERC maintains exclusive jurisdiction over interstate wholesale electricity rates indicates Plaintiff's state law claims are barred under the doctrine of field preemption. The only authority granted to the states under the FPA is over intrastate retail electricity sales. Because FERC retains "exclusive jurisdiction" over the regulation of interstate wholesale energy rates, under the "bright line" division of authority contained in the FPA, federal law occupies "an identifiable portion" of the regulated electricity field. Thus, to the extent that state regulation or court action would operate within the exclusive federal domain of wholesale energy rates, it is preempted. *Cf. id.*

Yet, Plaintiff's claims impermissibly seek to act within this field by asking the Court to award damages, restitution, disgorgement, or the like, in order to compensate Plaintiff for the difference between the wholesale rate it paid and what the Court determines to be a reasonable rate. This would equate to direct regulation of interstate wholesale electricity rates, which is preempted by the FPA.

B. Conflict Preemption

Even if Congress has not completely occupied a field, preemption exists if enforcement of state law could "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988). Even if Congress has permitted concurrent regulation within a particular field, state action is preempted if it interferes with, or even potentially interferes with, federal authority. *See id.* at 310 ("When a state regulation presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.'") (internal citations omitted). Not surprisingly, then, the Supreme Court has repeatedly found federal preemption wherever enforcement of state law would encroach on FERC's exclusive jurisdiction over wholesale interstate electricity rates. *See, e.g., Mississippi Power & Light v. Mississippi*, 487 U.S. 354, 371 (1988) (holding state proceedings affecting interstate rates were preempted because "FERC has exclusive authority to determine the reasonableness of wholesale rates.")

Additionally, the Ninth Circuit has found preemption in circumstances similar to those present in this case. In *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir. 2001), the Ninth Circuit dealt specifically with California's deregulated energy markets. In *Davis*, the Ninth Circuit held that executive orders issued by Governor Gray Davis under the California Emergency Services Act that commandeered contracts in the PX block forward market were preempted because they directly affected the terms and conditions of wholesale power sales governed by FERC. *Id.* at 1057-58.

In *Transmission Agency of Northern California v. Sierra Pac. Power Co.*, 295 F.3d 918, 929 (9th Cir. 2002), the Ninth Circuit found that plaintiff's tort and property claims impermissibly interfered with FERC's exclusive jurisdiction over the transmission and sale of wholesale electric power. In *Transmission*, plaintiff asserted state law tort and property claims based on its claimed right to a certain level of interstate transmission capacity. The Ninth Circuit held that the state law claims were preempted, because the Federal Power Act "delegates to the Federal Energy Commission the *exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *Id.* at 928 (emphasis in original).

Similarly, it is clear that here Plaintiff's state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates. The Court would impermissibly interfere with FERC's rate-making authority if it refunds wholesale

rates in this action, because in doing so the Court would essentially have to determine what constitutes "just and reasonable" rates. This conclusion is bolstered by the very fact that the same wholesale rates and rate-related practices that Plaintiff attacks here are the subject of several ongoing matters currently proceeding before FERC. Thus, it is difficult to escape the conclusion that any additional or different relief ordered by this Court would necessarily obstruct and frustrate FERC's proper regulatory effort.

C. Plaintiff's Arguments Against Finding Preemption

Plaintiff offers three core arguments supporting its view that its claims are not subject to federal preemption. First, Plaintiff argues that the FPA merely fills gaps in state regulation and therefore cannot preempt its claims. Second, Plaintiff contends that preemption is inapplicable because the FPA allegedly does not preempt antitrust laws. Lastly, Plaintiff asserts that there can be no conflict preemption because conflict preemption requires an "actual" conflict with an agency ruling, as opposed to a "potential future" conflict.

As to Plaintiff's first argument, it contends that Congress limited FERC's jurisdiction to those select areas not subject to existing state regulation, and thus, judicial "conduct" that may incidentally impact rates is not preempted by FERC's jurisdiction. It argues that because utility companies were subject to California antitrust and UCL regulation at the time the FPA was enacted, California retains jurisdiction as to these claims.

Plaintiff's argument, however, ignores the simple fact that the Federal Power Act granted FERC exclusive jurisdiction over the "field" at issue here-interstate wholesale energy rates. FERC's jurisdiction need not cover the entire power industry, but rather only an "identifiable portion" of the field. *See Pacific Gas & Elec. Co.*, 461 U.S. at 212-213. FERC's exclusive jurisdiction over wholesale energy rates constitutes such an "identifiable portion" of the field. Moreover, the D.C. Circuit has rejected an argument similar to Plaintiff's, stating "we must correct California's assumption that FERC's and its jurisdiction are *concurrent* . . . [h]ere if there be [FERC] jurisdiction over some component of the transaction, it is exclusive over that component." *See Public Util. Comm'n of State of Cal. v. F.E.R.C.*, 900 F.2d 269, 274 (D.C. Cir. 1990) (emphasis added).[6] Thus, Plaintiff's claim that state law can be preempted only if the specific purpose of a state statute is to regulate in an area reserved to FERC is plainly wrong. The Ninth Circuit's decision in *Duke Energy* makes this point

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6. In regard to its first argument, Plaintiff also points out that the FPA contains a policy declaration that federal regulation of the transmission and sale of electric energy was "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Plaintiff claims that California antitrust and unfair competition regulation of utilities were areas of state regulation contemplated by the policy declaration. The Supreme Court has rejected this contention, however, stating: "[t]he policy declaration that federal regulation is 'to extend only to those matters which are not subject to regulation by the States' is one of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 527 (1945).

clear. As noted, *Duke Energy* concerned the California Governor's attempt to use his power under the California Emergency Service Act to commandeer property associated with the power industry. *See* 267 F.3d at 1047. Obviously the California Emergency Power Act is hardly a statute whose central purpose is to regulate matters Congress intended FERC to regulate, yet the Ninth Circuit still held that the Governor could not use his emergency powers in a manner that would affect the terms and conditions of wholesale power sales governed by FERC. *Id.* at 1057-58.[7]

Plaintiff's second argument is that the Federal Power Act does not preempt antitrust claims. In this regard, Plaintiff notes that Congress preserved application of antitrust laws by adopting a savings clause stating that the FPA, as amended by the Energy Policy Act, "shall not be construed to modify, impair, or supercede the antitrust laws." 16 U.S.C. § 824k(e)(2). Plaintiff also argues that under the Supreme Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973), and its progeny, Defendants are not entitled to antitrust immunity and, as such, Plaintiff's antitrust claims are not preempted.

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7. The Supreme Court's decision in *Schneidewind* also dispels Plaintiff's argument that the relief it requests must directly regulate wholesale rates to be preempted. There, the state statute regulating the issuance of securities did not directly regulate wholesale rates, but was nevertheless preempted because it could force gas companies to raise rates by preventing them from issuing securities. 485 U.S. at 308 ("By keeping a natural gas company from raising its equity levels above a certain point, Michigan seeks to ensure that the company will charge only what Michigan considers to be a 'reasonable rate.' This is regulation of rates.").

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Plaintiff's argument concerning the savings clause contained in 16 U.S.C. § 824k(e)(2) is a red herring. The savings clause only "saves" a role for federal antitrust laws in connection with certain sections of the FPA. *See* 16 U.S.C. § 824k(e)(2) (applying clause to sections 824i, 824j, 824l, and 824m). Section 824d, which deals with interstate wholesale electricity rates, is *not* covered by the savings clause.

Plaintiff's reliance on *Otter Tail*, and its progeny, also is misplaced. In *Otter Tail*, the Department of Justice alleged that Otter Tail had "monopolized" in violation of the Sherman Antitrust Act by refusing to "interconnect" and "wheel" power from other wholesalers to new municipal utilities where Otter Tail had been retailing power. 410 U.S. at 368. At the time, the FPA did not grant the Federal Power Commission (FERC's predecessor) exclusive jurisdiction over the interconnection and wheeling of power issues. The FPC only had "limited authority" to order interconnections and no authority to order wheeling. *See id.* at 375. Ottertail argued that its refusals to deal were not subject to federal anti-trust laws. *Id.* at 373. The Court disagreed, noting that there was no pervasive regulatory scheme and, thus, "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id.* at 374.

Otter Tail, thus, relates to a different issue-antitrust immunity-that has little, if any, relation to the case at bar. The issue here is not whether Defendants are entitled to federal antitrust immunity but, rather, whether the Supremacy Clause prevents the Plaintiff's from employing state antitrust claims in a manner that intrudes on FERC's exclusive jurisdiction over interstate wholesale electricity rates. *See Square D. Co. v.*

Niagara Frontier Tariff Bureau, 476 U.S. 409, 422 (1986) (discussing distinction between antitrust immunity and preemption, stating "[w]e disagree . . . with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation."). Preemption is a function of the Supremacy Clause, and controls the interaction between state and federal laws. *Otter Tail* addressed only the interaction of two federal laws-the FPA and Sherman Antitrust Act-and hence is not a preemption case. Defendants are not seeking a broad, blanket repeal of antitrust laws in their motion to dismiss, but rather seek a narrower determination of whether Plaintiff's antitrust claim (and its UCL claim) in this particular action improperly intrude upon Congress's treatment of wholesale electricity rates and conduct.[8] Thus, while as a general proposition it may be true that electric utilities subject to FERC jurisdiction may not enjoy antitrust immunity, it does not imply that Plaintiff may nonetheless invade FERC's jurisdiction by employing a private, state-law antitrust remedy that changes FERC-regulated interstate wholesale electricity rates.

Lastly, Plaintiff's contention that preemption requires an "actual" rather than "potential" conflict also lacks merit. To begin with, Supreme Court precedent holds otherwise.

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8. Plaintiff also cites several cases that followed *Otter Tail* and concluded electric utilities are not immune from federal antitrust laws. *See, e.g. Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976). These cases do not deal with the issue of federal preemption of state law, however, and also have little bearing here.

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In *Schneidewind*, the Supreme Court held that the simply fact that there was an "imminent possibility" that the state regulation at issue would conflict with FERC jurisdiction supported a finding of preemption. *See* 485 U.S. at 310. Likewise, in *Mississippi Power & Light*, the Court held that the Mississippi Supreme Court "erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was *actually determined* in the FERC proceedings." 487 U.S. at 373 (emphasis added).

More importantly, it is difficult to characterize this case as only presenting a "potential" conflict, as FERC is currently conducting proceedings directly related to the issues in front of this Court. FERC appears to be in the process of making changes to the tariff rules and is investigating whether the operation of the tariffs, contracts, *etc.*, of the ISO and PX adversely affected the wholesale power markets in California. Thus, both the monetary and injunctive relief Plaintiff seeks here present direct and specific conflicts with FERC's regulatory authority.

Accordingly, **IT IS HEREBY ORDERED** that Defendant Powerex Corp.'s Motion to Dismiss and Motion to Strike (Ct. Rec. 3) and Defendants' Motion to Dismiss Complaint (Ct. Rec. 12) are **GRANTED.**

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and to furnish copies to counsel.

DATED this 6th day of January, 2003.

s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX C — CALIFORNIA BUSINESS AND PROFESSIONAL CODE § 17200 (2004)

BUSINESS AND PROFESSIONS CODE
DIVISION 7. General Business Regulations
PART 2. Preservation and Regulation of Competition
CHAPTER 5. Enforcement

§ 17200. Definition

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with *Section 17500*) *of Part 3 of Division 7 of the Business and Professions Code.*

APPENDIX D — CALIFORNIA BUSINESS AND PROFESSIONAL CODE § 16720 (2004)

Business and Professions Code
Division 7. General Business Regulations
Part 2. Preservation and Regulation of Competition
Chapter 2. Combinations in Restraint of Trade
Article 2. Prohibited Restraints on Competition

§ 16720. What constitutes a trust

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

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(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

APPENDIX E — 16 USCS §§ 824 & 824d (2004)

TITLE 16. CONSERVATION
CHAPTER 12. FEDERAL REGULATION AND DEVELOPMENT OF POWER
REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of Part

(a) Federal regulation of transmission and sale of electric energy. It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [*16 USCS §§ 824* et seq.] and the Part next following [*16 USCS §§ 825* et seq.] and that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this Part [*16 USCS §§ 824* et seq.] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph

(2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [*16 USCS §§ 824* et seq.] and the Part next following [*16 USCS §§ 825* et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 210, 211, and 212 [*16 USCS §§ 824i*, 824j, and 824k] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [*16 USCS §§ 791a* et seq.] with respect to such provisions. Compliance with any order of the Commission under the provisions of section 210 or 211 [*16 USCS §§ 824i* or 824j], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce. For the purpose of this Part [*16 USCS §§ 824* et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale". The term "sale of electric energy at wholesale" when used in this Part [*16 USCS §§ 824* et seq.] means a sale of electric energy to any person for resale.

(e) "Public utility" defined. The term "public utility" when used in this Part [*16 USCS §§ 824* et seq.] or in the Part next following [*16 USCS §§ 825* et seq.] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part [*16 USCS §§ 824* et seq.] (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212 [*16 USCS §§ 824i*, 824j, or 824k.])

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this Part [*16 USCS §§ 824* et seq.] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly

owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [*15 USCS § 79* et seq.].

Appendix E

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and

the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge,

classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall

be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause."

(1) Not later than 2 years after the date of the enactment of this subsection [November 9, 1978] and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

APPENDIX F — WESTERN ENERGY CRISIS CASES

A. NINTH CIRCUIT COURT OF APPEALS CASES

No.	*Case Name*	*Historical Court Case Nos.*
1.	*People v. Reliant Energy, Inc*	San Francisco Sup. Ct. No. 02-405435 USDC (N.D. Cal.) No. 02-1791 9th Circuit No. 02-16625, 03-15588
2.	*People v. Dynegy, Inc.*	San Francisco Sup. Ct. No. 02-405433 USDC (N.D. Cal.) No. 02-1854 9th Circuit No. 02-16619, 03-15588
3.	*People v. Mirant*	San Francisco Sup. Ct. No. 02-405429 Corp. USDC (N.D. Cal.) No. 02-1914 9th Circuit No. 02-16629, 03-15588

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4.	*Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. Dynegy Power Aft, Inc.*	USDC (C.D. Cal.) No. 02-5553 USDC (S.D. Cal.) No. 02-1993 244 F. Supp. 2d 1072 (S.D. Cal. 2003) 9th Circuit No. 03-55191
5.	*People v. Reliant Energy, Inc.*	San Francisco Sup. Ct. No. 02-406687 USDC (N.D.) No. 02-2061 9th Circuit No. 03-15590
6.	*People v. Mirant Corp.*	San Francisco Sup. Ct. No. 02-406461 USDC (N.D. Cal.) No. 02-2207 9th Circuit No. 03-15638
7.	*People v. Coral Power, L. L. C.*	San Francisco Sup. Ct. No. 02-406460 USDC (N.D. Cal.) No. 02-2400 9th Circuit No. 03-15694
8.	*People v. Puget Sound Energy, Inc.*	San Francisco Sup. Ct. No. 02-408498 USDC (N.D. Cal.) No. 02-3036 9th Circuit No. 03-15673

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9.	*People v. Transalta Energy Mktg., Inc., et al.*	San Francisco Sup. Ct. No. 02-408489 USDC (N.D. Cal.) No. 02-3040 9th Circuit No. 03-15696
10.	*People v. Tucson Elec. Power*	San Francisco Sup. Ct. No. 02-408489 USDC (N.D. Cal.) No. 02-3041 9th Circuit No. 03-15675
11.	*People v. Idaho Power Co.*	San Francisco Sup. Ct. No. 02-408488 USDC (N.D. Cal.) No. 02-3042 9th Circuit No. 03-15671
12.	*People v. Merrill Lynch Capital Svcs.*	San Francisco Sup. Ct. No. 02-408494 USDC (N.D. Cal.) No. 02-3127 9th Circuit No. 03-15691
13.	*People v. BP Energy*	San Francisco Sup. Ct. No. 02-408491 USDC (N.D. Cal.) No. 02-3311 9th Circuit No. 03-16337

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14.	*People v. Transcanada*	San Francisco Sup. Ct. No. 02-408487 USDC (N.D. Cal.) No. 02-3731 9th Circuit No. 03-15585
15.	*People v. Portland Gen. Elec. Co.*	San Francisco Sup. Ct. No. 02-408493 USDC (N.D. Cal.) No. 02-3318 9th Circuit No. 03-15849
16.	*Cal. v. Dynegy Power Mktg., Inc.* *	San Francisco Sup. Ct. No. 318189; USDC (N D. Cal., Oakland Div.) No. 01-cv-0780 CW USDC (S.D. Cal.) No. 01-1050 9th Circuit No. 02-57200
17.	*Pier 23 Rest. v. PG&E Energy Trading**	San Francisco Sup. Ct. No. 318343 USDC (N.D. Cal.) No. 01-0838 USDC (S.D. Cal.) No. 01-1051 9th Circuit No. 02-57200

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18.	*Hendricks v. Dynegy Power Mktg., Inc.*	San Diego Sup. Ct. No. GIC 758565 USDC (S.D. Cal.) No. 00-2524 9th Circuit No. 02-57200
19.	*Gordon v. Reliant Energy, Inc.**	San Diego Sup. Ct. No. GIC 758487 USDC (S.D. Cal.) No. 00-2525 9th Circuit No. 02-57200
20.	*Bustamante v. Dynegy Power Mktg., Inc.**	Los Angeles Sup. Ct., No. BC249705; USDC (C.D. Cal.) No. 01-4743 USDC (S.D. Cal.) No. 01-1447 9th Circuit No. 02-57200
21.	*Sweetwater Auth. v. Dynegy Power Mktg., Inc.*	San Diego Sup. Ct., No. GIC 760743 USDC (S.D. Cal.) No. 01-0387 9th Circuit No. 02-57200
22.	*Reliant Energy v. Ariz. Elec.*	USDC (S.D. Cal.) No. 02-1001 9th Circuit No. 02-57200

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23.	*People v. Reliant Energy*	USDC (S.D. Cal.) No. 02-0990 9th Circuit No. 02-57202
24.	*Reliant Energy v. Ariz. Pub. Svc.*	USDC (S.D. Cal.) No. 02-1000 9th Circuit No. 02-57210
25.	*Duke Energy v. Powerex Corp.*	USDC (S.D. Cal.) No. 02-1000 9th Circuit No. 03-55118
26.	*Reliant v. Powerex Corp.*	USDC (S.D. Cal.) No. 02-0990 9th Circuit No. 03-55131
27.	*NRG Energy, Inc. v. Powerex*	USDC (S.D. Cal.) 02-1001 9th Circuit No. 03-55176
28.	*Duke Energy v. Ariz. Pub. Svc.*	USDC (S.D. Cal.) No. 02-1000 9th Circuit No. 03-55241
29.	*Powerex v. Duke Energy Trading*	USDC (S.D. Cal.) No. 02-1001 9th Circuit No. 03-55249
30.	*People v. Duke Energy*	USDC (S.D. Cal.) No. 02-0990 9th Circuit No. 03-55266

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31.	*Duke Energy v. USA*	USDC (S.D. Cal.) No. 02-1000 9th Circuit No. 03-55319
32.	*Reliant Energy v. USA*	USDC (S.D. Cal.) No. 02-1001 9th Circuit No. 03-55322
33.	*Bonneville Power Admin. V. Reliant*	USDC (S.D. Cal.) No. 02-0990 9th Circuit No. 03-55349
34.	*Port of Seattle v. Avista*	USDC (W.D. Wash.) No. CV03-1170P USDC (S.D. Cal.) No. 03-2474 9th Circuit No. 04-55964

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B. DISTRICT COURT CASES

35.	*Millar v. Allegheny Energy Supply Co. LLC*	San Francisco Sup. Ct. No. 02-07867 USDC (N.D. Cal.) No. 02-2855 USDC (S.D. Cal.) No. 02-2179 USDC (N.D. Cal.) No. 04-0519
36.	*Kurtz v. Duke Energy Trading & Mktg., LLC*	USDC (C.D. Cal.) No. 02-8760 (class action) USDC (S.D. Cal.) No. 03-0011
37.	*Egger v. Dynegy, Inc.*	San Diego Sup. Ct., No. GIC 809822 (class action) USDC (S.D. Cal.) No. 03-1060
38.	*People of Mont. v. Williams Energy Mktg. & Trading Co.*	County of Lewis and Clark (Mont.) No. BDV 2003-383 USDC (D. Mont.) No. 03-CV-36
39.	*City of Tacoma v. Am. Elec. Power Svc. Corp., et al.*	USDC (W.D. Wash.) No. C04-5325 MDL No. 1405

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40.	*Wah Chang v. Duke Energy Trading & Mktg., LLC, et al.*	USDC (D. Or.) No. 04-CV-00615 MDL No. 1405
41.	*Wah Chang v. Avista Corp., et al.*	USDC (D. Or.) No. 04-CV-00619 MDL No. 1405
42.	*County of San Diego v. Sempra Energy, et al.*	San Diego Sup. Ct., No. GIC 833371 USDC (S.D. Cal.) No. 04-1685
43.	*County of Santa Clara v. Sempra Energy, et al.*	San Diego Sup. Ct., No. GIC 832538 USDC (S.D. Cal.) No. 04-1686
44.	*San Francisco City and County, et al. v. Sempra Energy, et al.*	San Diego Sup. Ct., No. GIC 832538 USDC (S.D. Cal.) No. 04-1684
45.	*People v. Mirant Corp.*	USDC (N.D. Cal.) No. 02-1787 US Bankruptcy Court (N.D. Texas) No. 03-46590

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46.	*People v. Reliant Energy, Inc.*	USDC (N.D. Cal.) No. 02-1788
47.	*Symonds v. Dynegy, Inc.*	USDC (W.D. Wash.) No. CV02-2522 Z MDL No. 1533
48.	*Lodewick v. Dynegy, Inc.*	Circuit Court of State of Oregon, County of Multnomah No. 0212-12771 USDC (D. Ore.) No. 03-157-AS MDL No. 1533

APPENDIX G — DECISION REGARDING REMAINING PORTION OF MOTION FOR SUMMARY JUDGMENT AND RELATED RELIEF OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 28, 2003

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 0113 16034 (AJG)

Jointly Administered

Adv. Pro. No. 02-2520 A

In re:

ENRON CORP., *et al.*,

Debtors.

ENRON POWER MARKETING, INC.,

Plaintiff,

v.

NEVADA POWER COMPANY and SIERRA PACIFIC POWER COMPANY,

Defendants.

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NEVADA POWER COMPANY and SIERRA PACIFIC POWER COMPANY,

Counter-Plaintiffs,

v.

ENRON POWER MARKETING, INC., ENRON CORP. AND TIMOTHY N. BELDEN,

Counter-Defendants.

DECISION REGARDING REMAINING PORTION OF MOTION FOR SUMMARY JUDGMENT AND RELATED RELIEF

Before the Court are various motions which impact Enron Power Marketing, Inc.'s ("EPMI") right to seek payment of certain Termination Payments EPMI maintains that it is owed by Nevada Power Company and Sierra Pacific Power Company (collectively, the "Defendants") under the Western Systems Power Pool Agreement (the "WSPP Agreement"), which governs power purchase and sale transactions between the parties, and certain separate confirmation agreements, which detail the specific transactions for the sale of power by EPMI to the Defendants.

This Court previously denied the Defendants' motion for a stay of this proceeding and panted EPMI's motion for summary judgment with respect to EPMI's claims for delivered power and ruled that collection of amounts due could be enforced. However, with respect to the Termination

Payments, the Court deferred ruling on (i) the request to stay this proceeding pending resolution of the FERC 206 Proceeding, and (ii) the request to enforce EPMI's right to collect, until the Defendants filed their defenses and counter-claims. After reviewing the Defendants' defenses and counter-claims, the Court has determined that EPMI is entitled to enforce the Termination Payments as well.

As previously discussed by the Court in its ruling on the delivered power, until FERC determines to alter a filed rate subject to FERC's regulatory power, any such rate is valid and enforceable. *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341, 76 S. Ct. 373, 379, 100 L. Ed. 373 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 353, 371-72, 76 S. Ct. 368, 100 L. Ed. 368 (1956); *See also*, 1988 Regulatory Fairness Act, 16 U.S.C. § 824e(b) which amended Section 206 of the Federal Power Act to establish a "refund effective date." Thus, pursuant to the filed rate doctrine, a regulated entity may not "charge rates for services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L. Ed. 2d 856 (1981). The goals of the filed rate doctrine are to prevent discrimination among ratepayers and to exclude the courts from the rate-making process. *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.DN.Y. 1996). The filing of the rate, even absent prior investigation and approval by the agency, triggers the filed rate doctrine. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 76 U.S. 409, 417 n.19, 106 S. Ct. 1922, 1927 n.19, 90 L.Ed.2d 413 (1986). The filed rate doctrine includes within its ambit "ancillary conditions

and terms included in the tariff," such as a termination charge. *Town of Norwood, Massachusetts v. New England Power Co.*, 202 F.3d 408, 416 (1st Cir. 2000). Thus, as long as the contract is in force, the tariff rate is enforced. Moreover, this Court has already ruled that, as FERC's expertise is not required for contract interpretation, and as this Court would not be making any determination as to the validity of the rates, it is within the competence of this Court to determine whether the provisions of the contract can be enforced.

This Court also previously concluded that it could not impose a rate or tariff other than that filed even if it considered another more equitable. This is because a court is constrained by the filed rate doctrine which requires that any filed rate "approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings," and that a court cannot "engage in retroactive rate setting." *Wegoland LTD v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). Sellers regulated by FERC must charge only the rate filed with FERC and only FERC may alter that rate. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 (5th Cir. 1987). The reasonableness of the tariff may not be replaced by the court even if it considers another one more reasonable. *Id.* at 1470. The filed rate doctrine precludes a court from affording relief that would entail refunding a portion of the filed rate or which would require the court to calculate damages and thereby determine the reasonableness of the filed rate. *Marcus v. AT&T Corp.*, 938 F. Supp. at 1170, 1172. As the rate is deemed reasonable, there is no legally cognizable injury resulting from paying such rate. *Marcus v. AT&T Corp.*, 938 F. Supp. at 1170.

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The Court also previously referenced the fact that equitable defenses to the collection of a filed rate are not recognized *Maislin Industr. v. Primary Steel, Inc.*, 497 U.S. 116, 127, 110 S. Ct. 2759, 2766, 111 L. Ed. 2d 94 (1990). The filed rate doctrine precludes defenses available to a defendant in an standard contract dispute. *Int'l Telecommunications Exchange Corp. v. MCI Telecommunications Corp.*, 892 F. Supp. 1520, 1540 (N.D. Ga. 1995). Once the reasonable rate is established, it cannot be varied by either contract or tort unless and until the rate is suspended or set aside. *Square D. Co*, 476 U.S. at 4160417, 106 S. Ct. at 1927. Thus, the filed rate doctrine does not recognize an exception to the rate based upon allegations of fraud upon the regulatory agency, and a rate that has been deemed reasonable by that agency is protected from challenge in a court based upon fraud. *Wegoland Ltd.*, 27 F.3d at 20. Courts have barred challenges to the filed tariffs based on antitrust allegations, *see Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 49-50, 67 L. Ed. 183 (1922); *Square D Co.*, 76 U.S. at 417, 106 S. Ct. at 1927, as well as those based on RICO allegations or claims of misrepresentation. *See Marcus v. AT&T Corp.*, 938 F.Supp. at 1170 (citing cases). The thrust of all of these types of allegations is that absent the improper conduct, different rates would have applied. *District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc., et al. (In re California Wholesale Elec. Antitrust Litigation*, 244 F. Supp. 2d 1072, 1077 (S.D. Cal. 2003). Thus, to calculate damages, a court would be required to assume a hypothetical rate, which was different from the filed rate, as the proper rate and this is directly contrary to the proscription of the filed rate doctrine which precludes a court from determining the reasonableness

of the filed rate. *Id*; *Marcus v. AT&T Corp.*, 938 F.Supp. at 1172. *See Wegoland Ltd.*, 27 F.3d at 21 (noting that "only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed doctrine forbids").

The filed rate must be collected despite its sometimes hash consequences because it incorporates the policy which Congress has adopted in regulating interstate commerce. *Louisville & Nashville RR Co. v. Maxwell*, 237 U.S. 94, 97, 35 S. Ct. 494, 495, 59 L. Ed 853 (1915); *Keogh*, 260 U.S. at 156, 163, 43 S.Ct. at 49-50. The harshness of the rule is tempered by the availability of other avenues for relief to the aggrieved ratepayer, thus, when fraud is alleged, the regulatory agency can investigate the charges and issue appropriate remedies to benefit the ratepayers. *Wegoland*, 27 F.3d at 21. Moreover, the filed rates are not a bar to governmental proceedings involving the alleged fraudulent conduct. *Square D. Co.*, 476 U.S. at 416 n.17, 106 S. Ct. at 1926 n.17; *Keogh*, 260 U.S. at 162, 43 S. Ct. at 49. *See also, Wegoland Ltd.*, 27 F.3d at 22 (noting that the filed rate doctrine does not immunize regulated industries from RICO or antitrust lawsuits bemuse while precluding individual ratepayers "from challenging the reasonableness of rates, the proper government officials remain free to pursue this avenue in appropriate circumstances"). As this Court previously commented, the Defendants here have availed themselves of the availability of FERC proceedings to challenge the validity of the rates in issue. In addition, various governmental investigations have been commenced.

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On June 26, 2003, FERC issued its decision in the 206 Proceeding commenced by the Defendants. *Nevada Power Co., et al. v. Enron Power Marketing, Inc., et al.* ("FERC Decision"), 103 FERC ¶ 61,353, 2003 WL 21485862 (June 26, 2003). In that decision, FERC affirmed the Administrative Law Judge's decision which denied the Defendants' request to modify the contracts. FERC Decision, 2003 WL 21485862, at *1, 25. In denying that request, FERC specifically asserted that it had considered the findings in the FERC "Staff's Final Report on Price Manipulation in Western Markets" (the "Staff Report") as well as evidence that had been submitted in the 100-Day Discovery Proceeding in a separate FERC litigation concerning spot-market rates. The Commission interpreted the relevant findings and evidence as suggesting that the spot markets were subject to market manipulation and gaming and that these market distortions carried forward to the long-term market. *Id.* at * 21. However, even assuming such influence, FERC found that the effect was not sufficient to warrant modification of the relevant contracts under the "public interest" standard it applied. *Id.* This was because the Defendants did not meet any of the elements to establish that the contracts were contrary to public interest. *Id.* at *22. FERC first found that the Defendants did not show that the contracts caused them such financial distress as would "threaten their ability to continue service." Rather, FERC found that the Defendants financial distress was caused by factors other than the contracts at issue in the proceeding. *Id.* at * 22. In addition, FERC found that the contacts placed no excessive burden on customers because even if required to pay on all the contracts, including those with EPMI, the increase would be at most 5%. *Id.* at *22. FERC also found that the contracts

were not discriminatory to other customers. *Id.* at *22. FERC further found that the Defendants had other options but voluntarily chose to enter into these contracts and that the fact that the contracts had become uneconomic did not justify modifying them under the applicable standard. *Id.* at *3. Moreover, FERC further concluded that a regulatory commission's grant of an umbrella market-based rate authorization is considered a pre-determination that rates under contracts entered into pursuant to that authorization will be just and reasonable. 2003 WL 21485862, at * 9. FERC further concluded that there was nothing in the record, in the final Staff Report, or in the 100-Day Discovery Proceeding evidence to support a finding that there was any "marker manipulation specific to the long-term contracts at issue." *Id.* at * 25. FERC also concluded that there was no evidence of "unfairness, bad faith, or duress in the original negotiations." *Id.* at 25.

One day prior to issuing its decision in the 206 proceeding, on June 25, 2003, FERC issued an order that revoked EPMI's authorization to sell power at market-based rates and terminated its electric market-based rate tariff. *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343, 2003 WL 21480248 *21, 23 (June 25, 2003) (the "Revocation Order"). It further determined that if EPMI emerges from reorganization, it must re-apply to FERC for new authorizations. *Id.* at 21. It reached its conclusion based on the evidence contained in the final Staff Report concerning gaming and market manipulation in the spot market.

The Defendants' First Amended Answer and Counter-claims and their Proposed Second Amended Answer and

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Counter-claims are permeated with allegations that the conduct of EPMI and Enron Corp. (collectively, the "Debtors") resulted in unjust and unreasonable rates. All of the Defendants' fraud, antitrust and RICO claims that are based on allegedly excessive rate charges, including claims that market manipulation resulted in excessive rates, are barred by the filed rate doctrine. This Court does not have jurisdiction to consider these issues as they are within FERC's exclusive jurisdiction. Thus, the claims that allege that the rates charged are the result of a manipulated market also are within FERC's exclusive jurisdiction. This is apparent when one considers that the Defendants seek to have this Court consider the final Staff Report – the same evidence that FERC considered in the 206 Proceeding – however, the Defendants seek for this Court to reach the opposite conclusion from that reached by FERC. Such a result would thwart the uniform regulatory goal. FERC asserted that it considered such evidence and that even accepting that there was some influence on the long-term rates, FERC deemed the evidence insufficient to modify the contacts in issue under the applicable standard. Moreover, even if FERC had not addressed the issue, this Court could not interfere with FERC's exclusive power to set the rates and terms of these contracts because it is within FERC's exclusive jurisdiction. All of the Defendants counter-claims and defenses alleging fraud, antitrust and RICO claims that are based on excessive rates charged are barred by the filed rate doctrine. Therefore, all of the Defendants defenses and counter-claims that challenge the rates and terms of the parties contracts are dismissed.

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The Court also rejects the Defendants' argument that the Court should consider the common law market manipulation claim based on a fraud on the market theory. This claim is premised on the Defendants' claim that they were defrauded because they relied on the integrity of the market price instead of relying on a specific representation by EPMI. Thus, even if such claim were recognized in this type of market and the Defendants could establish all of its elements, the gist of the claim is a challenge to the filed rate and, as such, any challenge would be within FERC's exclusive power as the regulatory agency charged with setting the terms and rates of regulated contracts.

FERC has determined that the evidence concerning spot market manipulation was not sufficient to justify modifying the long-term contracts under the public interest standard. The Defendants have sought rehearing before FERC on that issue. However, if unsuccessful, their only recourse is to appeal to a federal Court of Appeals 16 U.S.C. § 8251(b). While this Court may interpret the contracts to determine whether they should be enforced, it may not vary the rates as filed with FERC as it must honor those rates unless and until set aside by FERC.

In that regard, the Defendants argue that the Revocation Order, issued by FERC which revoked EPMI's authority to sell power at market-based rates, precludes EPMI from enforcing the Termination Payments. The Revocation Order, however, is prospective. It bars EPMI from entering into new market-based contracts, but does not impair EPMI's ability to enforce previously executed agreements. This is apparent from FERC's decision, rendered in the 206 Proceeding, in

which it determined to uphold enforcement of the parties' contracts despite their issuance the previous day of the Revocation Order. Moreover, the decision rendered in the 206 Proceeding requires the Defendants to continue to pay EPMI the contract rates.

The Defendants, citing to *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-72 (5th Cir 1987) and *Gelb v. AT&T*, 813 F. Supp. 1022, 1031-32 (S.D.N.Y. 1993), argue that they may maintain claims that do not interfere with FERC's rate-making power. The Defendants contend that their fraudulent inducement claims do not impede FERC's regulatory authority concerning rates because the Defendants do not seek to set aside the rates but rather seek to set aside their obligation to pay any rate.

The Defendants assert that it was fraudulently induced to enter the contract because EPMI misled them about its solvency. With respect to this claim, the Defendants cannot rely on allegations concerning Enron Corp.'s misrepresentations of its solvency, because Enron Corp. was neither a party to the contract nor a guarantor. With respect to EPMI, the Defendants cannot allege that they relied on any misrepresentations concerning EPMI's financial condition when they initially entered into the contract because, as found by FMC, the transactions were "brokered" and the Defendants were not aware of the identity of the counter-party when they entered into these agreements. In addition, and also with respect to any alleged subsequent obligation to disclose, there were two ways in which the Defendants waived the claim that they were misled by EPMI as to its solvency. First, they continued to accept performance

under the contract long after they learned of the Debtors' financial situation. The Defendants continued to accept deliveries after both Enron Corp. and EPMI filed for bankruptcy protection and despite the extensive publicity and dissemination of information concerning the Debtors' financial condition and credit rating. By continuing to accept the benefits of the contract after learning the Debtors' financial condition, the Defendants ratified the contract and waived their right to rescind it. *See Frailey v. McGarry*, 116 Utah 504, 513, 211 P.2d 840, 844 (1949). Second, the Defendants waived the exclusive remedy available to them under the contract when they did not pursue it after learning of the Debtors' insolvency. The Court also concludes that the insolvency claim is precluded because the Defendants can claim no damages as EPMI continued to deliver power as required under the terms of the contract. *See Dilworth v. Lauritzen*, 18 Utah 2d 386, 390, 424 P.2d 136, 138 (1967) (finding that to establish fraud and deceit a claimant must prove that it suffered damages resulting from the fraud).

Thus, we turn to enforcement of the contract. Pursuant to the terms of the parties' contact, EPMI was entitled to request assurances when the Defendants' rating was down-graded. Indeed, the Defendants' Chief Financial Officer testified that such down-grading entitled a counter-party under the WSPP Agreement to request assurances. Thus, EPMI's request, which comported with the terms of the contract, could not have been a breach of the contract or of any obligation of good faith or fair dealing.

As to the calculation, in its counter-claims, the Defendants detail the formula for calculating the amount to

be requested for assurance which was the precise formula utilized by EPMI. Therefore, the Defendants have made a judicial admission that EPMI used the correct formula to make the calculation.

Finally, because the Termination Payments were due and owing once the Defendants breached their respective obligations to provide assurance, EPMI was not required to establish an ability to perform in the future under the contracts. Rather, EPMI then had a right to payment and had no future performance obligations to deliver power. Thus, EPMI is entitled to enforce the contracts and to collect the Termination Payments.

The Defendants argue that it is incongruous for EPMI to be allowed to enforce the contracts and receive their benefits when FERC made a finding that the Debtors engaged in practices warranting revocation of the tariff. However, in the context of a regulated industry, under the filed rate doctrine, the decision of whether conduct that impacts filed rates should be sanctioned or redressed is left to the regulatory agency to determine, not the courts. Moreover, it would be contrary to the proper functioning of a regulated market and the goal of uniformity to allow one party to escape its obligation to pay under a tariff considered just and reasonable by the regulatory agency just because of the identity of the counter-party. This is especially true here where, because they were brokered transactions, there was no reliance on the identity of the counter-party when entering into the contracts. Moreover, FERC itself determined that the Debtors could continue to charge the contracted rate for the power. Any challenge to that determination must be by rehearing before

FERC or appeal to the proper federal Court of Appeals. Indeed, the Defendants have already commenced such process by requesting a rehearing before FERC on these issues.

The Defendants also filed a motion, dated June 11, 2003, to supplement the record concerning their opposition to EPMI's summary judgment motion and a motion for leave to file a second amended answer and counter-claim. The Defendants do not adequately explain why the additional issues they now seek to include could not have been asserted earlier. In addition, allowing the supplement at this stage would be prejudicial to their adversaries especially where the Court has partially ruled concerning the summary judgment motion. Moreover, the issues raised concerning allegations that the rates are unjust and unreasonable are not properly before this Court. For these and the additional reasons set forth in the Debtors' opposition, the Court denies the Defendants' motion to supplement the record. In addition, the Court denies the motion, dated June 11, 2003, requesting leave to file a second amended answer and counterclaims for the reasons set forth in the Debtor's opposition and because, having reviewed the proposed additions, the Court finds that the amendment would be futile and those claims would be denied in any case.

In conclusion, this is a "filed rate doctrine" case in which the ratepayer, counter-party to the contract, alleges fraud and such allegations have been brought before the appropriate regulatory agency to act for the benefit of the ratepayers. Under applicable case law, this Court is not the proper forum to remedy the counter-party's concerns and is required to enforce the contract.

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Based upon the foregoing, the Defendants' affirmative defenses are dismissed. In addition, EPMI's motion to dismiss the Defendants' counter-claims against EPMI is granted.

Further, because counter-claims VI-IX, as asserted by the Defendants-Counter-Plaintiffs' against Enron Corp., are precluded by the filed rate doctrine, Enron Corp.'s Motion to dismiss those counter-claims as against Enron Corp. is granted.

Moreover, to the extent that the Defendants' motion seeking to dismiss or stay this proceeding is not otherwise moot, it is denied. Further, the remaining portion of EPMI's motion for summary judgment on the its third claim for relief concerning the Termination Payment is granted.

Counsel for the Debtors is to settle an order, on five days' notice, consistent with this decision.

Dated: New York, New York
August 28, 2003

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

APPENDIX H — MINUTE ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO DATED AND FILED SEPTEMBER 30, 2004

SUPERIOR COURT OF TIE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

JUDICIAL COUNCIL COORDINATION PROCEEDINGS NOS. 4221, 4224, 4226, and 4228 September 30, 2004

Coordination Proceeding
Special Title (Rule 1550(b))

NATURAL GAS ANTI-TRUST CASES
CASES I, II, III, & IV)

This Document Relates to:
SEMPRA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE FIRST AMENDED MASTER COMPLAINT REGARDING PARENT-SUBSIDIARY, PREEMPTION, AND B&P 17200

MINUTE ORDER

INTRODUCTION

DURING THE FOUR-YEAR PENDENCY OF THIS LITIGATION PLAINTIFFS' THEORIES HAVE EVOLVED AS VOLUMINOUS DISCOVERY HAS OCCURRED AND AS CASE LAW HAS DEVELOPED. PLAINTIFFS' UNDOUBTEDLY WILL AMEND THE FAMC TO REFLECT THESE DEVELOPMENTS.

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IN HEARING THESE MOTIONS, THE COURT HAS REPEATEDLY EMPHASIZED THAT THEY BE DETERMINED ON THE MOST COMPLETE RECORD POSSIBLE. THEREFORE, THE COURT HAS INVITED AND ALLOWED LATE FILINGS OF EXPERT REPORTS, DECLARATIONS AND ATTACHMENTS, AND SUPPLEMENTATION THEREOF. FURTHER LETTER BRIEFS FROM EACH SIDE ON PREEMPTION WERE RECEIVED AND CONSIDERED ONLY YESTERDAY.

THE COURT HAS CONSIDERED ONLY ADMISSIBLE EVIDENCE IN RULING ON THESE MOTIONS. ALL EVIDENTIARY OBJECTIONS TO THE SUPPLEMENTAL DECLARATIONS OF ATTORNEYS PAUL TRAINA AND BRIAN MCMAHON, AND ATTACHED EXHIBITS, AS WELL AS THE SUPPLEMENTAL EXPERT REPORT OF CATHERINE YAP, ARE OVERRULED.

THE COURT TAKES JUDICIAL NOTICE OF THE MATTERS REQUESTED BY EACH PARTY PURSUANT TO EV. CODE 451 AND 452.

I. THE PARENT-SUBSIDIARY MOTION

DEFENDANT SEEKS SUMMARY JUDGMENT FOR CORPORATE DEFENDANT SEMPRA ENERGY ARGUING SEMPRA DID NOT EXIST AT THE TIME OF THE NOW NOTORIOUS 1996 MEETING IN THE DESERT AND NEITHER ENGAGED IN ANTICOMPETITIVE CONDUCT IN VIOLATION OF THE CARTWRIGHT ACT NOR UNFAIR BUSINESS PRACTICES UNDER B&P 17200.

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PLAINTIFFS HAVE SET FORTH ADMISSIBLE EVIDENCE SUFFICIENT FOR A JURY TO CONCLUDE THAT SEMPRA JOINED THE CONSPIRACY AND COMMITTED ACTS IN FURTHERANCE OF THE CONSPIRACY CAUSING DAMAGES. TWO INSTANCES OF CONSPIRATORIAL CONDUCT OF SEMPRA AFTER THE MERGER OF SDG&E WITH SOCAL GAS INVOLVED ITS PARTICIPATION IN THE 1998 BIDDING PROCESS FOR GAS SUPPLY AT A ROSARITO POWER PLANT AND ITS ACTS OF MANIPULATING THE CALIFORNIA GAS MARKET IN 2000-2001. PLAINTIFFS HAVE PROVIDED ADMISSIBLE EVIDENCE THAT THE GAS ACQUISITION COMMITTEE, NOMINALLY A COMMITTEE OF SOCAL GAS, IS RESPONSIBLE FOR MAKING DECISIONS REGARDING GAS STORAGE, HUB SERVICES, GAS ACQUISITION, THE CALCULATION OF FUTURE GAS SUPPLY, EXAMINING THE IMPACT OF GAS PRICES ON CORE CUSTOMERS OF SOCAL GAS AND DISCUSSING REGULATORY MATTERS CONCERNING ALL OF THOSE ISSUES. (SEE DECEMBER 9, 1999 SEMPRA ENERGY RISK MANAGEMENT AND TRADING POLICIES AND PROCEDURES ATTACHED AS EXHIBIT 18 TO MCMAHON DECLARATION.) PLAINTIFFS HAVE PROVIDED EVIDENCE THAT SOME OF THE SENIOR EXECUTIVES ATTENDING THE PHOENIX MEETING — e.g. WARREN MITCHELL, LATIMER LORENZ., EDWIN GUILES, AND STEVE MILLER — BECAME EXECUTIVES IN SEMPRA ENERGY. (SEE, DECLARATION OF PAUL A. TRAINA, SEPTEMBER 3, 2004 ("TRAINA DECL.,") AT PP. 6-22, 23-30-, AND 55-57.)

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SOME OF THE EXECUTIVES AND PARTICIPANTS AT THE PHOENIX MEETING WERE ALSO ACTIVELY INVOLVED IN SOCAL GAS COMPANY'S GAS ACQUISITION COMMITTEE. MOREOVER, THESE SAME PARTICIPANTS AT THE PHOENIX MEETING WERE AWARE IN 1996 THAT THROUGH THE GAS ACQUISITION COMMITTEE, SOCAL GAS HAD THE ABILITY TO MANIPULATE AND COULD PROFIT BY MANIPULATING THE STORAGE AND HUB SERVICES DURING A PERIOD OF CONSTRAINED GAS SUPPLY. PLAINTIFFS HAVE PROFFERED SUBSTANTIAL EVIDENCE THAT THE GAS ACQUISITION COMMITTEE DID IN FACT MANIPULATE GAS STORAGE AND HUB SERVICES DURING THE GAS CRISIS IN 2000-2001, THEREBY INCREASING GAS PRICES IN CALIFORNIA AND CREATING ENORMOUS PROFITS FOR SEMPRA. (SEE, TRAINA DECL. AT PP. 6-11; SEE ALSO, AUGUST 5, 2004 DECLARATION OF CATHERINE YAP ("YAP DECL.") AT PP. 2-3, 8-16; SEE ALSO, AUGUST 13, 2004 PHASE I-A OPENING BRIEF OF SOUTHERN CALIFORNIA EDISION AT P.15 ATTACHED AS EXH. 2 TO THE REQUEST FOR JUDICIAL NOTICE, SEPTEMBER 3, 2004 ("RJN".) A REASONABLE JURY COULD DETERMINE FROM THE EVIDENCE THAT THE MANIPULATION AND RESULTING PROFITS WERE NOT CONFINED TO ACTS SOLELY ATTRIBUTABLE TO SOCAL GAS OR SDG&E BUT WERE PART OF A CORPORATE STRATEGY TO PROFIT FROM THE RESULTING MERGER. PLAINTIFFS HAVE PRESENTED EVIDENCE SEMPRA AND SOCAL GAS PROFITED — APPROXIMATELY $160 MILLION 1N NET GAINS-AS A DIRECT RESULT OF THEIR MANIPULATION OF STORAGE AND SALE OF GAS DURING 2000-2001.

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(SEE YAP DECL. AT PP. 8, 15, AND EXS. F AND O THERETO.) MATERIAL ISSUES OF FACT EXIST FROM WHICH A REASONABLE JUROR COULD CONCLUDE THAT SEMPRA COMMITTED ACTS IN FURTHERANCE OF THE CONSPIRACY IN VIOLATION OF BOTH THE CARTWRIGHT ACT AND B&P 17200.

PLAINTIFFS HAVE PRESENTED EVIDENCE SEMPRA HAS A UNITY OF INTEREST WITH ITS SUBSIDIARIES WHICH RENDER IT LIABLE FOR THE ACTS OF SDG&E AND SOCAL GAS. SEMPRA'S MERGER CHRONOLOGY SHOWS THAT IN MARCH 1996, THE COMPANIES INITIATED TALKS CONCERNING "THE POSSIBILITY OF FORMING A JOINT VENTURE TO PURSUE MARKETING OPPORTUNITIES IN THE UNREGULATED SEGMENTS OF THE MARKETS FOR ENERGY PRODUCTS AND SERVICES." (BERRY EXH. F AT 58-59.) THE RESPECTIVE BOARDS WERE BRIEFED ON TERMS AND CONDITIONS OF BOTH "BUSINESS COMBINATION" AND A PROPOSED "ENERGY MARKETING JOINT VENTURE AGREEMENT" IN SEPTEMBER 1996 AND EARLY OCTOBER 1996. (BERRY EXH. F AT 58-59.) THIS ENERGY MARKETING JOINT VENTURE WAS ACTUALLY FORMED IN JANUARY 1997. (ID. AT 60). A "JOINT VENTURE BUSINESS PLAN" OF "ENOVA/PACIFIC ENTERPRISES MANAGEMENT SERVICES," DATED DECEMBER 18, 1996, FLESHES OUT THE MANY UNREGULATED BUSINESS LINES THAT ENOVA AND PACIFIC PLANNED TO ENTER DURING THE PERIOD IMMEDIATELY AFTER THE MERGER AGREEMENT WAS REACHED IN 1996. (MCMAHON SUPPLEMENTAL DECL., EXH. 1 AT P. 4). AMONG THE MANY BUSINESS LINES

CONTEMPLATED FOR THIS JOINT VENTURE OF THE PARENTS OF SOCAL GAS AND SDG&E WERE STORAGE SERVICES AND "HUB" SERVICES, WHICH INVOLVE THE SALE OF SERVICES RELATED TO UTILITY FACILITIES OWNED BY SOCAL GAS, AND WHICH ARE ALLEGED TO HAVE BEEN MANIPULATED IN 2000-2001 AND TO HAVE BEEN SUBSTANTIAL CAUSES OF CALIFORNIA'S NATURAL GAS PRICE SPIKES. THE ORGANIZATION OF SUCH A JOINT VENTURE IN THE INTERIM PERIOD BEFORE SEMPRA WENT INTO BUSINESS UNDER THE CONTROL OF THE UTILITY PARENT COMPANIES IS EVIDENCE THAT THE UTILITY PARENTS WERE NOT PASSIVE HOLDING COMPANIES BUT WERE INSTEAD OPERATING COMPANIES THAT COORDINATED THE ACTIVITIES OF THE UNREGULATED BUSINESSES CONDUCTED THROUGH THE "UNREGULATED" SUBSIDIARIES OF THE MERGED COMPANIES.

IN SUM, PLAINTIFFS HAVE PRESENTED SUFFICIENT EVIDENCE TO REQUIRE THAT A JURY DECIDE WHETHER SEMPRA PARTICIPATED IN THE ALLEGED CONSPIRACY. ACCORDINGLY, SEMPRA'S MOTION FOR SUMMARY JUDGMENT ON PARENT-SUBSIDIARY GROUNDS IS DENIED.

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II. PREEMPTION

The History

PLAINTIFFS FILED THEIR ORIGINAL COMPLAINT IN THIS ACTION IN SEPTEMBER 2000. THEREAFTER, DEFENDANTS AND EL PASO REMOVED THE ACTION AND SEVERAL RELATED ACTIONS TO FEDERAL COURT ON THE GROUNDS PLAINTIFFS' CLAIMS WERE PREEMPTED BY THE NATURAL GAS ACT 15. U.S.C. §717, ET SEQ. (NGA), THE NATURAL GAS POLICY ACT, 15 U.S.C. §3301, ET SEQ., (NGPA), AND THE FEDERAL POWER ACT, 16 U.S.C. §824, ET SEQ. (FPA). ON OCTOBER 25, 2001, JUDGE PRO OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA REMANDED THE CASE TO THE SUPERIOR COURT OF CALIFORNIA. IN RE CALIFORNIA RETAIL NATURAL GAS AND ELECTRICITY ANTITRUST LITIGATION, 170 F. SUPP. 2D 1052, 1060 (D. NEV. 2001.) IN RESPONSE TO THE CLAIMS OF FEDERAL PREEMPTION, JUDGE PRO HELD PLAINTIFFS' CLAIMS DID NOT "CHALLENGE CONDUCT WITHIN FERC'S EXCLUSIVE DOMAIN." ID. AT 1059 (EMPHASIS IN ORIGINAL). JUDGE PRO STATED PLAINTIFFS' COMPLAINT FOCUSED ON "DEFENDANTS' ALLEGEDLY CONSPIRATORIAL CONDUCT AS INDICATIVE OF ANTI-COMPETITIVE AND UNFAIR BEHAVIOR THAT IMPACTED THE SPOT MARKET FOR NATURAL GAS. FERC DOES NOT REGULATE THE "SPOT MARKET," AND FERC'S REGULATORY POWERS ARE NOT SO EXTENSIVE AS TO IMPLY PREEMPTION IN THE ENTIRE FIELD TO THE EXCLUSION OF ANTITRUST CLAIMS IN PARTICULAR," ID.

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BECAUSE OF EMERGING DISCOVERY, NEW CASE LAW, AND AMENDMENTS TO THE COMPLAINT, WE HAVE CONSIDERED THE PREEMPTION ISSUE SEVERAL TIMES. FOLLOWING REMAND FROM THE FEDERAL COURT, DEFENDANTS FILED A DEMURRER HERE ON THE GROUNDS OF FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. ON OCTOBER 16, 2002, THIS COURT OVERRULED THE DEMURRER.

> THESE CAUSES OF ACTION ARE NEITHER COMPLETELY PREEMPTED BY THE U.S. CONSTITUTION NOR ANY FEDERAL LAW. CONGRESS HAS NOT SHOWN AN INTENT TO PREEMPT THE FIELD AND STATE ANTITRUST AND UNFAIR COMPETITION CAUSES OF ACTION DO NOT CONFLICT WITH FEDERAL LAW. APPLICATION OF STATE ANTI-TRUST LAWS HAS BEEN NEITHER EXPRESSLY REPEALED NOR IMPLICITLY PREEMPTED. *CALIFORNIA V. FEDERAL POWER COMMISSION*, 369 U.S. 482, 485 (1962); *OTTER TAIL POWER CO. V. UNITED STATES*, 410 U.S. 366, 373-74 (1973). ADDITIONALLY THE FILED RATE DOCTRINE . . . IS NOT APPLICABLE BECAUSE THERE ARE NO TARIFFS CONCERNING THE SPOT MARKET FOR GAS. OCTOBER 16, 2002 RULING.

AFTER PLAINTIFFS AMENDED THE PLEADINGS AND FILED A MASTER COMPLAINT COVERING ALL RELATED PENDING ACTIONS BEFORE THE COURT, DEFENDANTS AGAIN DEMURRED BASED ON THE

FEDERAL PREEMPTION AND FILED RATE DOCTRINES. IN SUPPORT OF THEIR MOTION, DEFENDANTS CITED SEVERAL RECENTLY DECIDED CASES WHERE OTHER COURTS DISMISSED CLAIMS SEEKING RELIEF FOR MANIPULATION OF THE ELECTRICITY MARKET DURING THE ENERGY CRISIS BASED ON FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. DEFENDANTS ALSO CITED TO THE FERC ORDER ON PROPOSED FINDINGS ON REFUND LIABILITY (102 FERC 61,317 (2003)) AS EVIDENCE THAT THE FERC IS ACTING IN THE AREA AND WILL ISSUE A REFUND TO CALIFORNIA FOR THE MANIPULATION OF THE ENERGY MARKET. ON MAY 28, 2003, THE COURT OVERRULED DEFENDANTS DEMURRER.

> THE CASE AT BAR IS NOT ABOUT REGULATED RATES BUT RATHER THE UNREGULATED "SPOT MARKET" FOR NATURAL GAS AT THE CALIFORNIA BORDER AND SKYROCKETING PRICES FOR NATURAL GAS AND ELECTRICITY THEREFROM. THE CONSEQUENTIAL ELECTRIC PURCHASE DAMAGES RESULTING FROM THE NATURAL GAS CONSPIRACY ARE NOT ADDRESSED NOR WILL THEY BE REDRESSED IN ANY FERC WHOLESALE ELECTRICITY PROCEEDINGS. MAY 28, 2003 RULING.

SIX MONTHS LATER, DEFENDANTS AGAIN RENEWED THEIR DEMURRER BASED ON PREEMPTION AND THE FILED RATE DOCTRINE CITING NEW AUTHORITIES AS THEIR BASIS. IN AN OCTOBER 22,

2003 ORDER, THE COURT AGAIN OVERRULED DEFENDANTS DEMURRER AND ITS MOTION TO STRIKE. AFTER CONSIDERING THE NEW AUTHORITIES CITED, THE COURT DISTINGUISHED THE PENDING MATTER.

> PLAINTIFFS ARE: (1) NOT SUING THEIR ELECTRIC ENERGY SUPPLIER SEEKING A RATE REDUCTION FROM THAT WHOLESALE SUPPLIER; (2) ARE NOT CHALLENGING ANY FERC FILED RATE OF THEIR ELECTRIC ENERGY SUPPLIER (THERE IS NO FILED RATE OF NATURAL GAS SPOT MARKET PRICES AND RETAIL ELECTRIC RATES ARE NOT FERC REGULATED); (3) AND ARE NOT CHALLENGING OR SEEKING DAMAGES FOR ANY RATE RELATED CONDUCT THAT HAS BEEN APPROVED OR THAT IS BEING REDRESSED IN ANY FERC PROCEEDING. INSTEAD, THEY ARE SEEKING DAMAGE RELIEF FOR NON-RATE RELATED ANTICOMPETITIVE CONSPIRATORIAL CONDUCT THAT FERC CANNOT ADJUDICATE. OCTOBER. 22, 2003 RULING.

WHEN PLAINTIFFS AMENDED THEIR MASTER COMPLAINT TO ADD CERTAIN INDIVIDUAL PLAINTIFFS, DEFENDANTS AGAIN DEMURRED BASED ON FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. IN AN APRIL 27, 2004 ORDER, THE COURT OVERRULED DEFENDANTS' DEMURRER, HOLDING THE NEW AUTHORITY CITED BY THE DEFENDANTS

WAS IRRELEVANT TO THE PENDING CASE. "THE CASE LAW CONFIRMS THERE IS NEITHER A FILED RATE NOR A FEDERAL PREEMPTION BAR TO CALIFORNIA ANTITRUST CLAIMS CHALLENGING NON-RATE ANTICOMPETITIVE CONDUCT." FURTHER, "THE FBRC ORDERS CITED BY DEFENDANTS CONFIRM THAT FERC DOES NOT AND WILL NOT REGULATE SPOT MARKET PRICES OR ADDRESS OR PROVIDE A REMEDY FOR DEFENDANTS' CONSPIRATORIAL CONDUCT." APRIL, 27, 2004 MINUTE ORDER.

Summary Judgment Standard

A "PARTY MOVING FOR SUMMARY JUDGMENT BEARS THE BURDEN OF PERSUASION THAT THERE IS NO TRIABLE ISSUE OF MATERIAL FACT AND THAT THE PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW." *AGUILAR V. ATLANTIC RICHFIELD CO.*, 25 CAL. 4th 826, 850 (2001). THE MOVING PARTY ALSO BEARS THE BURDEN OF MAILING A PRIMA FACIE SHOWING THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT. ID. AT 850. WHERE, AS HERE, A SUMMARY JUDGMENT MOTION IS BASED ON AN AFFIRMATIVE DEFENSE, THE BURDEN ON THE MOVING DEFENDANT IS HEAVIER THAN MERELY SHOWING ONE OR MORE ELEMENTS OF THE PLAINTIFF'S CAUSE OF ACTION CANNOT BE ESTABLISHED. *ANDERSON V. METALCLAD INSULATION CORP.*, 72 CAL. APP. 4TH 284, 289 (1999). "INSTEAD OF MERELY SUBMITTING EVIDENCE TO NEGATE A SINGLE ELEMENT OF THE PLAINTIFF'S CAUSE OF ACTION, OR OFFERING EVIDENCE SUCH AS VAGUE OR INSUFFICIENT DISCOVERY RESPONSES THAT THE

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PLAINTIFF DOES NOT HAVE EVIDENCE TO CREATE AN ISSUE OF FACT AS TO ONE OR MORE ELEMENTS OF HIS OR HER CASE, THE DEFENDANT HAS THE INITIAL BURDEN TO SHOW THAT UNDISPUTED FACTS SUPPORT EACH ELEMENT OF THE AFFIRMATIVE DEFENSE". UNTIL THE MOVING DEFENDANT MEETS ITS INITIAL BURDEN OF ESTABLISHING EVERY ELEMENT OF THE AFFIRMATIVE DEFENSE NECESSARY TO SUSTAIN A JUDGMENT IN ITS FAVOR, THE OPPOSING PLAINTIFF HAS NO OBLIGATION TO PRODUCE ANY EVIDENCE. *CONSUMER CAUSE, INC. V. SMILECARE*, 91 CAL. APP. 4TH 454, 473 (2001; *HUYNH V. INGERSOLL-RAND*, 16 CAL. APP. 4TH 825, 830 (1993).

Federal Preemption and the Filed Rate Doctrine

FEDERAL LAW MAY PREEMPT STATE LAW IN THREE DIFFERENT WAYS:

1. CONGRESS CAN EXPRESSLY STATE SUCH AN INTENT IN ENACTING LEGISLATION. *JONES V. RATH PACKING CO.*, 430 U.S. 519, 525 (1977).

2. SUCH AN INTENT MAY BE INFERRED FROM THE PERVASIVENESS OF THE LEGISLATION SO "AS TO MAKE A REASONABLE INFERENCE THAT CONGRESS LEFT NO ROOM FOR THE STATE TO SUPPLEMENT IT." *RICE V. SANTA FE ELEVATOR CORP.*, 331 U.S. 218, 230 (1947).

3. STATE LAW MAY DIRECTLY CONFLICT WITH FEDERAL LEGISLATION. *SILKWOOD V. KERR-MCGEE CORP.*, 464 U.S, 238, 248, (1984).

RATHER THAN EXPRESSING AN INTENT TO PREEMPT ALL MATTERS RELATING TO THE TRANSPORTATION AND SALE OF NATURAL GAS, CONGRESS, IN ENACTING THE NGA "CAREFULLY DIVIDED UP REGULATORY POWER OVER THE NATURAL GAS INDUSTRY." *NORTHWEST CENTRAL PIPELINE CORP. V. STATE CORP.*, 489 US. 493, 510 (1989). THE COURT HAS PREVIOUSLY RULED THAT THE PRESENT CARTWRIGHT ACT AND UNFAIR COMPETITION CLAIMS ARE NOT PREEMPTED DIRECTLY, IMPLIEDLY OR AS THE RESULT OF ANY CONFLICT WITH THE NGA OR FPA. *CALIFORNIA V. FEDERAL POWER COMMISSION*, 369 U.S. 482, 485 (1962)(NGA); *OTTER TAIL POWER CO. V. UNITED STATES*, 410 U.S. 366, 373-74 (1973)(FPA).

Recent cases concerning Federal Preemption and the Filed Rate Doctrine

NEITHER *CALIFORNIA V. DYNEGY INC.*, 375 F. 3D 831 (9TH CIR. 2004), *PUBLIC UTILITY DISTRICT NO. 1 OF GREY'S HARBOR COUNTY WASHINGTON V. IDACORP, INC.*, __F. 3d__, 2005 WL 1774769 (9TH CIR. AUG. 10, 2004), *ULTIMAX.COM. INC. V. PPL ENERGY PLUS, LLC*, 378 F. 3d. 303 (3d CIR. 2004) NOR *PUB. UTILITY DIST. NO. I OF SNOHOMISH COUNTY V. DYNEGY POWER MARKETING, INC.* 2004DJDAR 11306 DEMONSTRATE THIS CASE IS PREEMPTED BY EITHER THE EXCLUSIVE JURISDICTION OF THE FERC OR THE FILED RATE DOCTRINE.

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CALIFORNIA V. DYNEGY INC., SUPRA INVOLVED A FERC TARIFF COVERING THE CALIFORNIA INDEPENDENT SERVICE OPERATOR ("CAL ISO"). *DYNEGY* 375 F. 3d AT 835-836.

> PURSUANT TO THE FPA, THE [IOS] MUST FILE SCHEDULES SHOWING ITS RATES AND CHARGES, AND THE PRACTICES AND REGULATIONS AFFECTING SUCH CHARGES. 16 U.S.C. §824d (c). THE FILING ENABLES FERC TO DETERMINE WHETHER THE ISO'S RULES AND REGULATIONS PERTAINING TO THOSE CHARGES ARE REASONABLE, AS REQUIRED BY THE FPA. *ID. AT 839.*

THE CASE AT BAR, INVOLVING UNREGULATED SPOT MARKET PRICES FOR NATURAL GAS, IS DISTINGUISHABLE. *PUBLIC UTILITY DISTRICT NO. 1 OF GREY'S HARBOR "GRAY'S HARBOR"*) (SUPRA) AND *ULTIMAX.COM, INC. SUPRA*, ALSO BOTH INVOLVED SALES OF ELECTRICITY.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY (SUPRA) ALSO INVOLVED INTERSTATE SALES OF WHOLESALE ELECTRICITY. IT DID NOT INVOLVE THE BORDER SALE OF NATURAL GAS ON THE SPOT MARKET.

THE RECENT FERC ORDER DATED 9-24-04 ENTITLED "ORDER DENYING REHEARING, CERTIFYING FUEL COST ALLOWANCE ISSUES, AND ACCEPTING IN PART COMPLIANCE FILINGS", (DOCKET

NO. EL00-95-098, 108 FERC 61, 311) ALSO POINTS OUT THE FUNDAMENTAL DISTINCTION BETWEEN THE WHOLESALE ELECTRICITY MARKET THAT OPERATES PURSUANT TO A FERC FILED AND APPROVED TARIFF AND THIS CONSPIRACY CASE THAT ALLEGEDLY IMPACTED THE UNREGULATED SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER. THE FERC ORDER INDICATES A REFUND WILL NOT AND IS NOT INTENDED TO COMPENSATE CALIFORNIA ELECTRICITY CONSUMERS FOR "SCARCITY" EFFECTS IN THE NATURAL GAS MARKETS THAT DROVE ELECTRICITY PRICES.

DEFENDANTS HAVE NOT IDENTIFIED A FERC TARIFF, RATE FILING OR RATE SETTING REGULATION THAT CONTROLS THE SPOT MARKET PRICE OF NATURAL GAS AT THE CALIFORNIA BORDER.

THE FERC'S EXCLUSIVE JURISDICTION DOES NOT REACH TO THE NON-RATE BASED CONSPIRACY AT ISSUE IN THIS CASE THAT ALLEGEDLY RESTRAINED NATURAL GAS CAPACITY INTO CALIFORNIA RESULTING IN A SPIKE IN THE SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER *COLUMBIA STEEL CASTING CO. V PORTLAND GENERAL ELECTRIC CO.*, 111 F. 3d 1427, 1446 (9TH CIR. 1997) (CONSPIRACY NOT TO COMPETE IN A MARKET NOT PREEMPTED OR BARRED BY FILED RATE DOCTRINE).

THE FERC'S REFUND ORDER REGARDING THE AMOUNT ELECTRICITY SELLERS MUST REFUND TO CALIFORNIA CONSUMERS IS CALCULATED BY THE

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DIFFERENCE BETWEEN WHAT THEY CHARGED CALIFORNIA CONSUMERS AND A "JUST AND REASONABLE" RATE ABSENT THE DYSFUNCTION IN THE ELECTRICITY MARKET.

THE FERC ULTIMATELY DECIDED TO CALCULATE THE NATURAL GAS COST INPUT BASED ON THE PRODUCTION AREA COST PLUS A REASONABLE TRANSPORTATION RATE TO THE CALIFORNIA BORDER. THIS "PROXY" FORMULA IS NOT FIXED, BUT IS SUBJECT TO AN EXCEPTION THAT ALLOWS THE ELECTRICITY WHOLESALERS TO REDUCE THEIR REFUND LIABILITY BY SHOWING THAT THEIR ACTUAL NATURAL GAS COSTS EXCEEDED THE PROXY BORDER GAS PRICE FORMULA EMPLOYED BY THE FERC. ENERGY SELLERS ARE ENTITLED TO A CREDIT TO THE EXTENT THEY PAID THE ANTICOMPETITIVE SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER AT ISSUE IN THIS CASE. THE EFFECT OF THIS CREDITING MECHANISM IS TO REDUCE THE REFUND AND LEAVE IN PLACE THE PASS-THROUGH OF THE ANTICOMPETITIVE NATURAL GAS PRICE TO THE PLAINTIFFS IN THIS ACTION. THE FERC REFUND ORDER DOES NOT ADDRESS OR REMEDY THE HARM CAUSED BY DEFENDANTS ALLEGED ANTICOMPETITIVE CONDUCT THAT IMPACTED THE SPOT MARKET PRICE OF NATURAL GAS AT THE CALIFORNIA BORDER BY ALLOWING ELECTRICITY SELLERS TO BE MADE WHOLE FOR THEIR ACTUAL COST OF NATURAL GAS EVEN THOUGH THEY MAY HAVE PASSED THIS COST ON TO ELECTRICITY CONSUMERS, THE FERC REFUND

ORDER DOES NOT ADDRESS OR REMEDY THE HARM WHICH MAY HAVE BEEN CAUSED BY DEFENDANTS ANTICOMPETITIVE CONDUCT THAT IMPACTED THE SPOT MARKET PRICE OF NATURAL GAS AT THE CALIFORNIA BORDER.

THIS DISTINCTION BETWEEN ANTICOMPETITIVE CONDUCT WITHIN AN ELECTRICITY MARKET OPERATING PURSUANT TO A FERC FILED AND APPROVED TARIFF AND A CAUSE OF ACTION ARISING FROM WRONGFUL CONDUCT COMMITTED OUTSIDE A JURISDICTION THAT HAS AN ATTENUATED IMPACT ON THE MARKET IS RECOGNIZED IN *DYNEGY*. UNDER *DYNEGY*, THE QUESTION RELEVANT TO FPA EXCULSIVITY IS WHETHER A PLAINTIFFS' CONSEQUENTIAL DAMAGE CLAIM IS A SUIT TO "ENFORCE OR EXPAND" RULES, REGULATIONS OR ORDERS OF THE FERC UNDER THE FPA. 375 F. 3d AT 843. IN DISTINGUISHING *PAN AMERICAN PETROLEUM CORP. V. SUPERIOR COURT OF DELAWARE*, 366 US 656 (1960), WHICH UPHELD STATE COURT JURISDICTION OVER A CONTRACT CLAIM THAT RELATED TO A TARIFF CONTRACT FILED WITH THE FERC, *DYNEGY* NOTED THAT *PAN AMERICAN* STANDS FOR THE PROPOSITION THAT CLAIMS "FALLING OUTSIDE THE SCOPE OF THE EXCLUSIVE JURISDICTION PROVISION ARE NOT SUBJECT TO IT." 375 F 3d AT 843. IN ORDERING THE ELECTRICITY REFUND THE FERC FOUND THAT "THE ELECTRIC MARKET STRUCTURE AND MARKET RULES FOR WHOLESALE ELECTRICITY IN CALIFORNIA THAT WERE THE SUBJECT OF A FERC FILED AND APPROVED TARIFF WERE SERIOUSLY FLAWED AND

THAT THESE STRUCTURES AND RULES, IN CONJUNCTION WITH AN IMBALANCE OF SUPPLY AND DEMAND IN CALIFORNIA, HAD CAUSED, AND WOULD CONTINUE TO HAVE THE POTENTIAL TO CAUSE, UNJUST AND UNREASONABLE RATES FOR SHORT-TERM ENERGY, (ORDER PROPOSING REMEDIES FOR CALIFORNIA WHOLESALE ELECTRIC MARKETS, 93 FERC PP. 61,121 AT 5 (NOVEMBER 1, 2000)). THE FERC REFUND ORDER SEEKS TO MITIGATE THE ELECTRICITY MARKET DYSFUNCTION, AND NOT THE ANTICOMPETITIVE CONDUCT RELATING TO NATURAL GAS AT ISSUE IN THIS CASE.

WHILE CONGRESS IN 1988 AMENDED THE FPA AND EXPRESSLY GRANTED THE FERC AUTHORITY TO GRANT THE REFUNDS WHEN IT DETERMINES THAT AN ELECTRICITY RATE IS UNJUST AND UNREASONABLE, CONGRESS DID NOT SIMILARLY EXPAND THE FERC'S JURISDICTION UNDER THE NGA. 16 U.S.C. §824e(b) (SEE ORDER PROPOSING REMEDIES FOR CALIFORNIA WHOLESALE ELECTRIC MARKETS, 93 FERC PP. 61, 121 AT APPENDIX E DISCUSSING LIMITED NATURE OF FERC'S REFUND AUTHORITY AND THE BAR AGAINST RETROACTIVE RATE SETTING). THE FERC LACKS THE JURISDICTION TO AWARD A REFUND OR ANY REPARATIONS FOR UNJUST OR UNREASONABLE NATURAL GAS RATES. *FEDERAL POWER COMMISSION V. HOPE NATURAL GAS CO.*, 320 U.S. 591, 681(1944) (IT IS CONCEDED THAT UNDER THE ACT THE COMMISSION HAS NO POWER TO MAKE REPARATIONS."); *UNITED GAS V. GALLERY PROPERTIES*, 382 U.S. 223, 229 (1965) (COMMISSION HAS NO POWER TO MAKER REPARATION ORDERS).

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III B&P 17200
Disgorgement of profits

CONTROLLING STATUTORY AND JUDICIAL AUTHORITY ALLOW DISGORGEMENT OF PROFITS AS A REMEDY IN A UCL CLASS ACTION. CAL. CODE COV. PROC, §384; *KRAUS V. TRINITY MANAGEMENT SERVICES*, 23 CAL. 4TH 116,129134 (2000); *CORBETT V. SUPERIOR COURT*, 101 CAL. APP. 4TH 649, 671 (2002). SINCE 1993, THE REMEDY OF DISGORGEMENT INTO A FLUID RECOVERY FUND FOR CLASS ACTIONS HAS BEEN EXPRESSLY AUTHORIZED BY CCP §384. CALIFORNIA COURTS ALSO HAVE APPROVED OF FLUID RECOVERY FUNDS COMPRISED OF A DISGORGEMENT OF ILL-GOTTEN GAINS AS AN EQUITABLE REMEDY FOR THE PURPOSE OF BENEFITING THE INJURED PARTIES AS WELL AS DETERRING THE PERPETRATOR FROM COMMITTING THE SAME UNLAWFUL ACTS AGAIN. *CALIFORNIA V. LEVI STRAUSS & CO.*, 41 CAL. 3d 460, 472 (1986). INDEED, THE REMEDY OF FLUID RECOVERY FOR A CLASS ACTION SERVES SEVERAL IMPORTANT PURPOSES, PARTICULARLY IN AN ACTION ARISING UNDER THE UCL. BECAUSE "EACH CLASS MEMBER CANNOT BE COMPENSATED EXACTLY FOR THE DAMAGE HE OR SHE SUFFERED, THE BEST ALTERNATIVE IS TO PAY DAMAGES IN A WAY THAT BENEFITS AS MANY OF THE CLASS MEMBERS AS POSSIBLE AND IN THE APPROXIMATE PROPORTION THAT EACH MEMBER HAS BEEN DAMAGED, EVEN THOUGH, MOST PROBABLY, SOME INJURED CLASS MEMBERS WILL RECEIVE NO COMPENSATION AND SOME PEOPLE NOT IN THE CLASS WILL BENEFIT FROM

THE DISTRIBUTION . . ." *BRUNO V. SUPERIOR COURT*, 127 CAL. APP. 3d 120, 123-24 (1981).

CONTRARY TO THE DEFENDANTS' ARGUMENT, PERMITTING PLAINTIFFS TO SEEK A FLUID RECOVERY FUND IN THEIR CLASS ACTION DOES NOT MODIFY SUBSTANTIVE LAW. *KOREA SUPPLY CO. V. LOCKHEED MARTIN CO.*, 29 CAL. 4TH 1134 (2003). BY ITS OWN TERMS, APPLIES ONLY TO INDIVIDUAL UCL ACTIONS AND DOES NOT MODIFY SUBSTANTIVE LAW ALLOWING PLAINTIFFS TO SEEK A REMEDY OF DISGORGEMENT OF PROFITS IN A FLUID RECOVERY FUND. INDEED, THE COURT IN KOREA SUPPLY QUOTED FAVORABLY FROM KRAUS: "FURTHER, IN KRAUS WE NOTED THAT THE LEGISLATURE HAS AUTHORIZED DISGORGEMENT INTO A FLUID RECOVERY FUND IN CLASS ACTIONS." KRAUS V. TRINITY MANAGEMENT SERVICES, 23 CAL. 4TH 116, 137. 29 CAL. 4TH AT 1148 N.6. CCP§ 384 EXPRESSLY AUTHORIZES SUCH A REMEDY FOR CLASS ACTIONS - WITHOUT REGARD TO THE UNDERLYING LAW THAT SERVES AS THE BASIS FOR RECOVERY. SINCE THE REMEDIES AVAILABLE UNDER THE ULC ARE "CUMULATIVE TO EACH OTHER AND TO THE REMEDIES OR PENALTIES AVAILABLE UNDER ALL OTHER LAWS OF THIS STATE" (SEE B&P § 17205), THEY CLEARLY EMCOMPASS THE REMEDY OF DISGORGEMENT INTO A FLUID RECOVERY FUND CCP § 384, AS APPROVED IN *KRAUS*.

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PLAINTIFFS DO NOT SEEK RESTITUTION BUT RATHER DISGORGEMENT OF PROFITS INTO A FLUID RECOVERY FUND. QUANTIFYING THE AMOUNT SOUGHT AT THIS POINT IS NOT ONLY PREMATURE, BUT ALSO UNNECESSARY AS A MATTER OF LAW.

Injunctive Relief

UNDER B&P § 17203, AN INJUNCTION IS PROPER FOR DEFENDANTS' PAST CONDUCT ALONE, SINCE AN INJUNCTION MAY BE HAD AGAINST ANY PERSON WHO "ENGAGES, HAS ENGAGED, OR PROPOSES TO ENGAGE IN UNFAIR COMPETITION. ." *.DAY V. AT&T CORP.*, 6.3 CAL. APP. 4TH 325, 337 (1998). PLAINTIFFS DO NOT, THEREFORE, NEED TO DEMONSTRATE THAT THERE IS A LIKELIHOOD OF DEFENDANTS ENGAGING IN FUTURE UNFAIR COMPETITION.

Civil Penalties claimed by the Cities of Los Angeles and Long Beach

B&P §17206 ALLOWS PUBLIC ENTITIES TO OBTAIN CIVIL PENALTIES UNDER THE UCL IF SUCH ACTIONS ARE PROPERLY AUTHORIZED BY RELEVANT AUTHORITIES. IN THIS CASE, LONG BEACH CITY ATTORNEY ROBERT E. SHANNON AND LOS ANGELES CITY ATTORNEY ROCKARD DELGADILLO HAVE EACH SOUGHT SUCH CIVIL PENALTIES IN A SEPARATE CAUSE OF ACTION BROUGHT BY THEM AGAINST DEFENDANTS. (SEE FAMC, FOURTH CAUSE OF ACTION). DEFENDANTS, HOWEVER, ARGUE THAT THESE INDIVIDUALS ARE NOT AUTHORIZED TO SEEK SUCH CIVIL PENALTIES.

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THE PLEADINGS IN THIS CASE PROVE OTHERWISE. PLAINTIFFS' FAMC STATES THE CITY ATTORNEYS OF BOTH CITIES - - NOT PRIVATE PLAINTIFFS - - ARE BRINGING CLAIMS FOR CIVIL PENALTIES AGAINST DEFENDANTS. FAMC PP. 14-28. BOTH CITY ATTORNEYS ARE LISTED ON THE CAPTIONS OF THE COMPLAINT AND IN THE PLEADINGS IN THIS MATTER. THEY ARE, THEREFORE, "DIRECTLY PROSECUTING" THE PORTIONS OF THESE ACTIONS SEEKING CIVIL PENALTIES. UNLIKE IN *STOP YOUTH ADDICTION. INC. V. LUCKY STORES. INC.* 17 CAL. 4TH 554, 575 N.10 (1998), PLAINTIFFS HERE ARE NOT ATTEMPTING TO "RECAST" A PRIVATE ACTION INTO A PUBLIC ACTION,

THE CITY ATTORNEY OF LOS ANGELES IS ENTITLED TO BRING AN ACTION UNDER B&P § 17206 ON HIS OWN AUTHORITY. AS AUTHORIZED BY B&P § 17206, THE CITY ATTORNEY OF LONG BEACH HAS ALSO OBTAINED THE REQUIRED PERMISSION TO DO SO FROM THE DISTRICT ATTORNEY OF LOS ANGELES. (SEE EXHIBIT A TO DECLARATION OF M. BRIAN MCMAHON FILED CONCURRENTLY HEREWITH (FEBRUARY 21, 2001 LETTER FROM STEVE COOLEY, LOS ANGELES COUNTY DISTRICT ATTORNEY TO ROBERT E. SHANNON, CITY OF LONG BEACH)). THE COURT THEREFORE FINDS THESE PUBLIC ENTITIES ARE PERMITTED TO BRING CLAIMS FOR CIVIL PENALTIES PURSUANT TO B&P § 17206.

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Conclusion

FOR THE REASONS DISCUSSED ABOVE, PLAINTIFFS' UCL CLAIMS ARE NOT PRECLUDED AS A MATTER OF LAW. UNDER CALIFORNIA STATUTORY AND JUDICIAL AUTHORITY, PLAINTIFFS ARE ENTITLED TO PURSUE A REMEDY IN THE FORM OF A DISGORGEMENT OF PROFITS FLUID RECOVERY, PLAINTIFFS SEEK A QUANTIFIABLE RECOVERY, IT IS PREMATURE TO RULE ON THE AVAILABILITY OF A PERMANENT INJUNCTION, AND THE CITY OF LOS ANGELES AND CITY OF LONG BEACH ARE LEGALLY ENTITLED TO PURSUE CIVIL PENALTIES. ACCORDINGLY, THE MOTION FOR SUMMARY JUDGMENT IS DENIED.

SEPTEMBER 30, 2004

s/ J. Richard Haden
J. Richard Haden
Judge of the Superior Court

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 9, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-73093

No. FERC-EL02-71-000

STATE OF CALIFORNIA, ex rel. Bill Lockyer, Attorney General,

Petitioner,

CORAL POWER, LLC; DUKE ENERGY NORTH AMERICA, LLC; DUKE ENERGY TRADING AND MARKETING, LLC; TRANSCANADA ENERGY LTD.; CITY OF TACOMA, WASHINGTON; PORTLAND GENERAL ELECTRIC COMPANY; DYNEGY POWER MARKETING, INC.; EL SEGUNDO POWER LLC, LONG BEACH GENERATION LLC; CABRILLO POWER I LLC; CABRILLO POWER II LLC; MIRANT AMERICAS ENERGY MARKETING LP; MIRANT CALIFORNIA, LLC; MIRANT DELTA, LLC; MIRANT POTRERO, LLC; PUBLIC SERVICE COMPANY OF NEW MEXICO; EL PASO MERCHANT ENERGY LP; BP ENERGY CO.; PUBLIC SERVICE COMPANY OF COLORADO; PINNACLE WEST CAPITAL CORPORATION; ARIZONA PUBLIC SERVICE CO.; PACIFICORP; PACIFICORP POWER MARKETING, INC.; STRATEGIC ENERGY LLC,

Intervenors,

MORGAN STANLEY CAPITAL GROUP, INC.,

Respondent-Intervenor,

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AES Companies; Reliant Energy Services, Inc.; Enron Power Marketing, Inc.; Enron Energy Services, Inc.,

Intervenors,

Powerex Corp.; Puget Sound Energy; Avista Energy, Inc.; Sempra Energy Trading Corp., Sempra Energy Solutions; Sempra Energy Resources,

Respondents-Intervenors,

California Public Utilities Commission,

Petitioner-Intervenor,

Williams Energy Marketing & Trading Company,

Intervenor,

v.

Federal Energy Regulatory Commission,

Respondent,

Avista Corporation,

Intervenor,

Long Beach Generation LLC,

Respondent-Intervenor.

Appendix I

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued and Submitted
October 9, 2003—San Francisco, California

Filed September 9, 2004

Before: Sidney R. Thomas, M. Margaret McKeown, and
Richard R. Clifton, Circuit Judges.*

OPINION

THOMAS, Circuit Judge:

This case presents the question, *inter alia,* of whether the Federal Energy Regulatory Commission ("FERC") properly authorized and administered market-based energy tariffs. The State of California ("California"), through its Attorney General, claims that it did not, and that California energy consumers are entitled to as much as $2.8 billion in refunds. We conclude that FERC's authorization of market-based tariffs in this case complied with the Federal Power Act, but that FERC abused its administrative discretion by declining to order refunds for violations of its reporting requirements. We therefore grant California's petition in part and remand this case to FERC for refund proceedings.

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* Following oral argument of this case, Judge Hawkins recused himself. Judge McKeown was drawn as a replacement judge.

Appendix I

I

California's energy crisis in 1995 prompted the California Public Utilities Commission[1] and the California legislature to restructure the electric energy industry. The resulting legislation, Assembly Bill 1890 ("AB 1890"), was designed to dismantle the investor-owned, government-regulated utility model and create a deregulated market in which price would be established by competition. Act of September 23, 1996, 1996 Cal. Legis. Serv. 854, *codified in* Cal. Pub. Util.Code § § 330-398.5. Under AB 1890, the major investor-owned, vertically-integrated[2] utilities were required to divest a substantial portion of their power

1. The Commission is an agency established by the California Constitution. Cal. Const. art. XII. One of the Commission's duties is the regulation of retail rates for electricity charged by investor owned utilities in California. Cal. Pub. Util.Code § 451. The Commission's restructuring order is contained in *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Legislation,* D. 95-12-063 (Dec. 20, 1995), *modified by* D. 96-01-009 (Jan. 10, 1996).

2. In the power industry, there are three major vertical components: generation, transmission, and distribution. Generation involves the production of power through a variety of means. Transmission generally refers to the transmission of high voltage electric power from the points of generation to substations for conversion to delivery voltages. Distribution refers to the delivery of the converted low voltage energy from substations to individual consumers. Under the vertically integrated model, one government-regulated company owned the generation resources, the transmission lines, and the distribution facilities. Under a deregulated model, different entities separately own the generation, transmission, and distribution assets.

generation plants, to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse known as the California Power Exchange Corporation ("CalPX"). CalPX, which was created by AB 1890, was to provide a centralized auction market for the trading of electricity. It was thus deemed a public utility pursuant to the Federal Power Act, *see* 16 U.S.C. § 824(e), and thus subject to regulation by FERC, *see* 16 U.S.C. § 824(b), (d).[3]

AB 1890 created another non-profit entity, the Independent System Operator ("ISO"), also subject to FERC jurisdiction, which was to be responsible for managing California's electricity transmission grid and balancing electrical supply and demand. Its operations were to be governed by a tariff and protocols filed with FERC. Under AB 1890, purchases and sales of wholesale power by investor-owned utilities were now subject to FERC jurisdiction. *So. Cal. Edison,* 307 F.3d at 801.

Thereafter, three major investor-owned utilities filed applications with FERC seeking approval of the

3. This is not our first foray into the thicket of California's attempt to deregulate the power industry. Thus, an exhaustive rendition of the factual background is not required. Further general details are provided in some of our previous decisions. *See, e.g., State of California ex rel. Lockyer v. Dynegy,* __ F.3d __, 2004 WL 1488195 (9th Cir. July 6, 2004); *Southern California Edison Co. v. Lynch,* 307 F.3d 794, 801 (9th Cir.2002); *In re California Power Exchange Corporation,* 245 F.3d 1110, 1114-19; *Duke Energy Trading and Marketing, L.L.C. v. Davis,* 267 F.3d 1042, 1045-46 (2001).

establishment of CalPX and the ISO, authority to convey operational control of the transmission facilities to the ISO, and authority to sell electrical energy at market based rates. *See Pacific Gas and Electric Co.*, 77 FERC ¶ 61,265 (1996); *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,204 (1996); *Pacific Gas and Electric Co.*, 77 FERC ¶ 61,077 (1996).

A condition of FERC's approval of an entity's market-based rate authority was a FERC determination that the entity lacked, or had adequately mitigated market power in the California markets. FERC conducted these inquiries as a means of carrying out its statutory mandate under the Federal Power Act to ensure "just and reasonable" wholesale rates for electricity. 16 U.S.C. § 824d(a). FERC approved the utilities' requests, and granted permission for the utilities to sell electricity at market-based rates in California. FERC also approved the establishment of the ISO and CalPX, which then commenced operations in late March 1998. *See generally Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997).

In June 2000, wholesale electricity prices increased dramatically. In August, San Diego Gas & Electric Company filed a complaint under § 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e(a), against all sellers of energy and ancillary services into the CalPX and ISO markets. In response, FERC instituted hearing procedures under FPA § 206 to investigate the justness and reasonableness of the rates of sellers that were subject to FERC jurisdiction into the ISO and CalPX markets.

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Electricity prices remained at high levels in the winter of 2001, and California's largest utility, Pacific Gas and Electric Company, filed a voluntary petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code. In January of 2001, the Governor of the State of California declared a state of emergency. Pursuant to that order, and in light of rolling blackouts, the Governor directed the State Department of Water Resources ("DWR") to purchase wholesale power on the spot market. By October of 2001, California Energy Resources Scheduler ("CERS"), a division of DWR, had spent approximately $10 billion buying energy on the spot market.

In November of 2000, having reviewed San Diego Gas & Electric's complaint, FERC adopted several reform measures. FERC found that the "California market structure provide[d] the opportunity for sellers to exercise market power" in times of tight supply and that such market power could result in "unjust and unreasonable rates." *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange,* 93 FERC ¶ 61,121 (2000). In addition to ordering structural and rule changes, FERC ordered an evidentiary hearing to determine the appropriate refund. However, FERC limited the refund to ISO and CalPX spot market transactions during the period from October 2, 2000 through June 20, 2001.

A year later, the State of California filed the instant complaint against all sellers of power and ancillary services subject to FERC jurisdiction in markets operated by the ISO and CalPX and sellers of power to CERS (collectively,

"California Wholesalers"), alleging that FERC's market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires. California claimed that FERC's improper decision to limit the refund period reduced the refunds owed to California purchasers by as much as $2.8 billion.

In order to remedy the alleged violations, California urged FERC to:

> 1) require the California Wholesalers to comply, on a prospective basis, with Section 205 rate-filing requirements;
>
> 2) to the extent the information [was] not already being provided . . . require the California Wholesalers to provide transaction-specific information to FERC on all of their short-term sales to the ISO, CalPX and CERS for the calendar years 2000-2001;
>
> 3) to the extent that any rates for short-term power sold to the ISO, CalPX, or CERS are found to exceed just and reasonable levels, require the California Wholesalers to refund the difference between the rate charged and a just and reasonable rate, plus interest;
>
> 4) issue a declaration specifying that the rates for short-term power sold to the ISO, CalPX, and CERS are not subject to the filed rate doctrine; and

> 5) institute proceedings to determine whether any other further relief is necessary or appropriate, up to and including the revocation of the California Wholesalers' market based rate authority.

The California Wholesalers contended, and FERC ultimately concluded, that California's complaint amounted to an impermissible collateral attack on prior Commission orders pertaining to FERC's market-based rate authority and procedures, on prior FERC determinations regarding refund liability, and as to FERC's decisions to grant the various defendants their respective market-based rate authority. FERC granted the complaint in part, holding that where the California Wholesalers had reported aggregated rather than transaction-specific data, the reports failed to comply with FPA § 205(c). Rather than ordering refunds for the reporting violations, however, FERC held that "the failure to report transactions in the format required by FERC for quarterly reports is essentially a compliance issue" for which "re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." 99 FERC ¶ 61,247 at 62,068 (2002).

California timely filed a petition for review of FERC's decision and properly invokes our jurisdiction to review final orders of FERC pursuant to 16 U.S.C. § 8251(b).

Appendix I

II

The Federal Power Act governs the transmission and wholesale sales of electrical energy in interstate commerce. 16 U.S.C. § 824(b). Pursuant to its authority under the FPA, FERC has exclusive jurisdiction over interstate wholesale power rates. *Id.; Nantahala Power and Light Co. v. Thornburg,* 476 U.S. 953, 956 (1986). The FPA requires that all rates for the transmission and sale of wholesale electricity be filed with FERC and published for public review. 16 U.S.C. § 824d(c). FERC is obligated to ensure that wholesale power rates are "just and reasonable," 16 U.S.C. § 824d(a), and applied in a non-discriminatory manner, 16 U.S.C. § 824d(b); *Entergy Louisiana, Inc. v. Louisiana Public Service Com'n,* 539 U.S. 39, 41 (2003). Indeed, FERC's authority to determine whether wholesale rates are "just and reasonable" is exclusive. *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 371 (1988).

Much of the theory that underpins the present controversy has its roots in the "filed rate doctrine," which is central to FERC's operations. "The 'filed rate doctrine' was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 138 (1990) (Stevens, J., dissenting). During that period, railroad companies often charged substantially higher rates on noncompetitive routes, granted secret discounts to preferred shippers, and overcharged competitors of preferred customers. These concerns, among others, led to the passage of the Interstate Commerce Act ("ICA") in 1887. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887)

(codified as amended at scattered sections of 49 U.S.C.). The "great purpose" of the ICA, as the Supreme Court has said, was "to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, . . . to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination." *New York, N.H. & H.R. Co. v. ICC,* 200 U.S. 361, 391 (1906). Under the ICA, a carrier could charge a shipper only those rates incorporated in a tariff that the carrier had filed with the ICC. The rate became effective after it was filed unless the rate or the practice employed by the carrier was deemed unreasonable by the ICC. The requirement that carriers collect only the rate they filed, or that the ICC established, became commonly referred to as the "filed rate doctrine." The doctrine, as applied, also meant that private parties could not contract for a price other than the filed rate.

The Supreme Court first articulated the filed rate doctrine as applied to the power industry in 1951 in *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.,* 341 U.S. 246, 251-52 (1951). The Court held that rates established in power sales contracts filed with and accepted by FERC's predecessor, the Federal Power Commission, were not only binding on the parties, but on the federal courts. *Id.* In short, under the filed rate doctrine, once rates have been accepted for filing under FPA § 205, utilities must adhere to those rates absent a waiver. *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 577 (1981). The rate filed by the wholesale seller of electricity or fixed by FERC is the only lawful charge and "[d]eviation from it is not permitted upon any pretext."

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AT & T v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1986). Unless the filed rates are challenged administratively, the filed rates become the legal rates. If the rates are challenged, then FERC decides whether the rates are "just and reasonable" and not "unduly discriminatory." Parties may challenge FERC's resolution of these issues in a petition for review before the appropriate United States Court of Appeals. 16 U.S.C. § 8251(b). However, appellate review is deferential. *See City of Seattle v. FERC*, 923 F.2d 713, 715 (9th Cir.1991).

With a fixed rate tariff, the review process is relatively straightforward. A wholesaler would file a rate, which would become the legal rate unless challenged. If FERC determined that the rate was not "just and reasonable" after a challenge, then it would order refunds.

However, approximately a decade ago, companies began to file market-based tariffs that did not specify the precise rate to be charged. As a result, FERC then departed from its historical policy of basing rates upon the cost of providing service plus a fair return on invested capital, and began approving market-based tariffs.

California contends that the market-based tariff system approved by FERC in this case violates the FPA because it relies on unfiled, privately negotiated rates to satisfy statutory rate filing requirements, and that this cannot be sustained even when the agency has made a prior determination that market forces will drive rights into a zone of reasonableness.

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In considering FERC's tariff-approving authority, the Supreme Court has emphasized "that the just and reasonable standard does not compel the Commission to use any single pricing formula. . . ." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Co.*, 498 U.S. 211, 224 (1991) (discussing the "just and reasonable" requirement in the natural gas context). The Court has recognized that the "just and reasonable" requirement accords FERC "broad rate-making authority." *Id.*

The use of market-based tariffs was first approved in the natural gas context, *see Elizabethtown Gas Co. v. FERC,* 10 F.3d 866, 870 (D.C.Cir.1993), then as to wholesale sellers of electricity, *see Louisiana Energy and Power Authority v. FERC,* 141 F.3d 364, 365 (D.C.Cir.1998). However, approval of such tariffs was conditioned on the existence of a competitive market. *Id.* Thus, market-based applications were approved only if FERC made a finding that "the seller and its affiliates [did] not have, or adequately [had] mitigated, market power." *Id.*[4] The principle justifying this approach as "just and reasonable" was that "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. FERC,* 908 F.2d 998, 1004 (D.C.Cir.1990).

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4. FERC defines market power as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,777 (1989).

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In support of its contention that market-based tariffs are impermissible under the FPA, California relies on *MCI Telecommunications Corp. v. AT & T,* 512 U.S. 218 (1994) and *Maislin Indus. US v. Primary Steel Inc.,* 497 U.S. 116, 132 (1990). In *MCI,* the Supreme Court held that the FCC could not eliminate rate-filing requirements for any class of carrier, even when necessary to promote competitive markets. In *Maislin,* the Court held that the ICC could not allow common carriers to charge unfiled, privately negotiated rates lower than the filed rates, even when the carriers were in highly competitive markets. *Id.* at 132-33. As the Court stated in *Maislin,* the existence of a competitive market "cannot provide the ICC authority to alter well-established statutory filed rate requirements." *Id.* at 135.

However, the regulatory scheme before us is different from those under consideration in *MCI* and *Maislin.* The agencies in *MCI* and *Maislin* relied on market forces alone in approving market-based tariffs. In contrast, FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is "just and reasonable" and that markets are not subject to manipulation. Here, FERC required the wholesale seller to file a market analysis every four months, and quarterly reports summarizing its transactions during the preceding three months. These transaction summaries include both long and short-term contracts, purportedly with reports of some sales for intervals as small as ten minutes. FERC has affirmed in its presentation before us that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine.

Rather, the crucial difference between *MCI/Maislin* and the present circumstances is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements. Given this, FERC argues that its market-based tariff does not run afoul of *MCI* or *Maislin,* and we agree.

California argues that different reporting requirements should have been established. However, Congress specified that filings be "within such time and within such form" and under "such rules and regulations as the Commission may prescribe," 16 U.S.C. § 824d(c). Thus, so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff.

For all of these reasons, California's facial challenge to market-based tariffs fails.[5]

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5. FERC argues that California's facial challenge to market-based tariffs is an impermissible collateral attack on FERC's decision in *San Diego Gas & Elec. Co.,* 96 FERC ¶ 61,120. We disagree. Both the nature and scope of California's challenge to FERC's system of market-based rates differ significantly from previous narrow challenges to particular aspects of FERC's system. Moreover, while California was a late intervenor in a pertinent proceeding, it was foreclosed from fully litigating the claims at issue in this case. Thus, FERC erred in dismissing California's claims as an impermissible collateral attack on prior Commission orders. As indicated above, however, we agree with FERC that both the Congressionally enacted statutory scheme, and the pertinent case law, indicate that market-based tariffs do not *per se* violate the FPA.

Appendix I

III

Our determination that market-based tariffs do not, *per se,* violate the FPA does not end our inquiry. California also argues that, even if market-based tariffs are lawful in concept, FERC failed to administer the tariffs in accordance with their terms and abused its discretion in limiting available remedies for regulatory violations. On these issues, we agree with California.

As we have discussed, there is nothing inherent in the general concept of a market-based tariff that violates the FPA; however, as *MCI* and *Maislin* affirm, a market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight. The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were "just and reasonable" and whether market forces were truly determining the price.

For example, in *Enron Power Marketing, Inc.,* 65 FERC ¶ 61,305, FERC emphasized that transaction-specific reporting "is necessary so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power." Similarly, FERC has stated that transaction-specific data is the "minimum needed for market monitoring purposes." *Revised Public Utility Filing Requirements,* 99 FERC ¶ 61,107 (2002).

Despite the crucial nature of the transactional reporting, as FERC admits, the reporting requirements were not followed in the period at issue. Indeed, non-compliance with FERC's reporting requirements was rampant throughout California's energy crisis. FERC itself has acknowledged that during the height of the energy crisis the quarterly reports of several major wholesalers failed to include the transaction-specific data through which the agency at least theoretically could have monitored the California energy market:

> The quarterly reports submitted . . . by a number of the respondents do not comply with [the] requirements. For example, Williams Energy Marketing and Trading Company, Dynegy Power Marketing, Inc., Mirant Americas Energy Marketing, LP and Reliant Energy Services, Inc. filed aggregated data in their transaction reports for the fourth quarter 2000 and all four quarters of 2001. . . . Similarly, any other filings that report aggregate data did not comply with the reporting requirements.

State of California ex rel. Bill Lockyer, Attorney General of the State of California v. British Columbia Power Exchange Corp. et al., 99 FERC ¶ 61,247 at 62,066 (2002).

Thus, the very mechanism that distinguished FERC's tariff from those prohibited by the Supreme Court in *MCI* and *Maislin* was, for all practical purposes, non-existent while energy prices skyrocketed and rolling brown-outs threatened California's businesses and citizens.

Appendix I

Despite the promise of truly competitive market-based rates, the California energy market was subjected to artificial manipulation on a massive scale. With FERC abdicating its regulatory responsibility, California consumers were subjected to a variety of market machinations, such as "round trip trades"[6] and "hockey-stick bidding,"[7] coupled with manipulative corporate strategies, such as those nicknamed "FatBoy," "Get Shorty," and "Death Star."[8]

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6. Round-trip trades are a mechanism for market manipulation through which an entity attempts to inflate transaction volume through the continuous and frequent sale of a particular commodity. The trades create the appearance of increased revenue and demand, but in actuality produce no net income.

7. Hockey-stick bidding is a fraudulent practice whereby an extremely high price is demanded for a small portion of a product in light of known inelastic demand (as was the case for energy in California during the energy crisis).

8. These monikers are strategies referred to in now notorious internal memos at the Enron Corporation that were released to the public by FERC. "FatBoy" refers to a strategy through which the Houston-based energy company allegedly withheld previously agreed-to deliveries of power so it could sell the energy at a higher price on the spot market. To execute this, the company would over-schedule its load; supply only enough power to cover the inflated schedule; and thus leave extra supply in the market, for which the ISO would pay the company. Via the "Get Shorty" strategy, traders were able to fabricate and sell emergency back-up power (known as ancillary services) to the ISO, receive payment, then cancel the schedules and cover their commitments by purchasing through a cheaper market closer to the time of delivery. Under the "Death Star" strategy, Enron allegedly sought to be paid "for moving energy to

(Cont'd)

However, despite the integral nature of the reporting requirements to an effective market-based tariff, and despite the patent failure of many of the affected companies to provide even minimal reporting, FERC's position here is that violation of tariff reporting requirements is merely a technical "compliance issue," and it is therefore without authority to order refunds retroactively based on reporting failures.

FERC misapprehends its legal authority in this context. In fact, FERC possesses broad remedial authority to address anti-competitive behavior. *See Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 686 (D.C.Cir.2000). Indeed, in the past, FERC has ordered refunds in instances where utilities violated FPA § 205, either by violating the terms of an accepted rate, or by charging rates without first seeking approval under FPA § 205. In *The Washington Water Power Co.,* 83 FERC ¶ 61,282 (1998), FERC ordered profits disgorged because a regulated utility had violated posting requirements and conferred undue preferences on its marketing affiliate. To do otherwise would allow companies to flout our regulations, and overcharge consumers with impunity." 24 FERC ¶ 61,199 at 61,461, *reh'g order,* 24 FERC ¶ 61,380, *reh'g denied,* 25 FERC ¶ 61,308 (1983).

(Cont'd)

relieve congestion without actually moving any energy or relieving any congestion." *See 'FatBoy,' 'Get Shorty,' and 'Inc-Ing': A Look at Enron Trading Practices,* May 13, 2002, Electric Utility Week 7, 2002 WL 10510230; *see also Enron Memos Put FERC in the Hot Seat; All Western Sellers Will be Grilled,* May 13, 2002, Electric Utility Week 1, 2002 WL 10510221 (noting, *inter alia,* that while Enron's monikers may have been unique, its practices in the California energy market were not).

Here, because the reporting requirements were an integral part of a market-based tariff that could pass legal muster, FERC cannot dismiss the requirements as mere punctilio. If the ability to monitor the market, or gauge the "just and reasonable" nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all. The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance. FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so. In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy, and the filed rate doctrine would preclude a direct action against the offending seller. That result does not comport with the underlying theory or the regulatory structure established by the FPA.

One of the animating ideas behind the FPA and the filed rate doctrine was, as we have discussed, the prevention of price discrimination and the imposition of unjust and unreasonable rates by requiring that all customers receive the same published rate. As the Supreme Court noted in *Maislin,* the purpose of the filed rate doctrine is undermined when it is impossible to review the reasonableness of privately negotiated, unfiled rates. 497 U.S. at 132. If the tariff is interpreted as FERC urges here, then the tariff runs afoul of *Maislin,* the filed rate doctrine, and the FPA. If, on

the other hand, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market-based tariff is permitted. FERC cannot have it both ways. The FPA does not permit it.

FERC argues that we owe it deference under *Chevron USA Inc. v. NRDC,* 467 U.S. 837 (1984) and that as a result, we cannot reach a contrary conclusion about the limits of its remedial authority. However, *Chevron* does not require blind deference; the Supreme Court has articulated a more thorough and nuanced approach. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 125-26 (2000). Under *Chevron,* we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Brown & Williamson,* 529 U.S. at 132 (quoting *Chevron,* 467 U.S. at 843).

As we have often stated, "[w]hen we look to the plain language of a statute in order to interpret its meaning, we do more than view words or subsections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *United States v. Hanousek,* 176 F.3d 1116, 1120 (9th Cir.1999) (quoting *Carpenters Health & Welfare Trust Funds v. Robertson* (*In re Rufener Constr.*), 53 F.3d 1064, 1067 (9th Cir.1995)).

Thus, as the Supreme Court emphasized in *Brown & Williamson,* we must analyze the provision in the context of the entire governing statute, *see id.*, presuming congressional intent to create a "symmetrical and coherent regulatory scheme." *Id.* at 133 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

In addition, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision." *Id.* If, after conducting such an analysis, we conclude that Congress has not addressed the issue, we "must respect the agency's construction of the statute so long as it is permissible." *Id.* at 132 (citing *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424 (1999)).

In this instance, our statutory construction of FERC's authority is dictated by the plain language and words of the Federal Power Act, and by a common sense application of the principles underlying the FPA. To cabin FERC's section 205 refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA, and cannot be sustained under *Maislin* and *MCI.*

FERC's construed limitations on its own authority are not supported by a careful examination of the FPA. Either the quarterly report requirement is an integral part of the authorizations under § 205, in which case violations of the requirement cannot be dismissed as mere "compliance issue[s]," or the reporting requirement is a mere compliance issue, in which case, where FERC neglects to require the filing of the reports, and thus does not engage in an active

ongoing review, the only arguably serious regulatory screening that exists is FERC's initial determination with respect to a seller's market power—a determination that may bear little or no relation to the realities of subsequent circumstances.

It is true that pending a § 205 investigation, FERC may suspend a rate for a period of up to five months, at which point the proposed rate becomes effective subject to a refund if FERC ultimately determines the initially-suspended rate to be unreasonable. However, when the § 205 determination consists of a blanket approval of market-based rates determined solely (at least at the outset) on a lack of market power, the purgatorial period contemplated by the statute does not exist. Either FERC determines an entity has market power and thus is unauthorized to sell at market-based rates, or FERC determines an entity lacks market power and is thus authorized to sell at market-based rates. In the case of the former, there is no market-based rate authority whatsoever subject to the remedies in § 205. In the case of the latter, because the "rates" are already "approved," the only remedies are prospective, and, for that matter, unavailable for a period of 60 days pursuant to § 206(b). In other words, the § 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it. Such an interpretation comports neither with the statutory text nor with the Act's "primary purpose" of protecting consumers. So while we agree with FERC that market-based tariffs are not *per se* invalid under the FPA, it is clearly incorrect to conclude that the reporting requirements are anything less than essential to a valid administration of the market-based system at issue in this case.

As we have noted, FERC itself has recognized that it possesses the authority to impose retroactive refunds for § 205 violations in *Washington Water Power* and *Delmarva Power.* Here, the reporting requirements were an integral part of a market-based tariff that could pass legal muster. The FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA. In short, the governing statute can be easily construed in accordance with the principles articulated by the Supreme Court in *Brown & Williamson.* Therefore, FERC's *Chevron* argument necessarily fails.

For these reasons, we agree with California that FERC improperly concluded that retroactive refunds were not legally available. Although California urges us to order refunds, we decline to do so. It is more appropriate for FERC to reconsider its remedial options in the first instance. We therefore grant the petition and remand to FERC for further proceedings consistent with this opinion.

PETITION GRANTED; REMANDED.

APPENDIX J — LETTER TO SENATOR CANTWELL FROM THE FEDERAL ENERGY REGULATORY COMMISSION DATED JULY 7, 2004

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON. DC 20426

OFFICE OF THE CHAIRMAN July 7, 2004

The Honorable Maria Cantwell
United States Senate
Washington, DC, 20510-4705

Re: Enron Proceedings

Dear Senator Cantwell:

Thank you for your June 14, and June 21, 2004 letters regarding the Commission's investigations of the Enron Corporation and its affiliates during the Western electricity crisis in 2000 and 2001.

The recently released audiotapes give a shrill and ugly voice to the data we have already found and used in a number of dockets and in our 2002 investigation. Enron's egregious activities were first spelled out in the December 2000 Enron strategy memoranda that the Commission obtained in May 2002 (attached hereto), which I immediately made public on the Commission's web site. Further, upon issuing the Final Report on Price Manipulation of Western Markets (PA02-2-000) in March 2003, the Commission made public over 2 terabytes of information (equivalent to 1.38 million hard floppy discs) and hundreds of boxes of written material, protecting only the information that we controlled that

contained information that could compromise employee privacy. Some of the records we obtained from Enron passed from FERC's control into that of the United States Department of Justice (DOJ) to support their criminal investigation.

The Commission sought to make all information about Enron's manipulative schemes available to the public, except for information that would compromise other agencies' prosecutions. The public nature of our investigation has been unprecedented in our agency's experience and will, I think, serve to discipline any future attempts of this kind.

In your letter, you erroneously state that the Commission has attempted to "quash and obstruct the investigation of Enron's illegal activity." The information to which you refer in your June 14, 2004 letter was in the custody of DOJ, having been seized from Enron, along with a wealth of other data, pursuant to search warrants in the fall of 2002, something that the attorneys general of California and Washington also knew.

No one, including FERC, could get access to these data from DOJ until they were able to release it following their criminal investigation. The motion to quash that you mention was filed by the Commission's trial staff at the request of the United States Attorney's Office for the Northern District of California (USAO) because the audiotapes were in the USAO's control, not the Commission's. In fact; the trial staff worked with the USAO to facilitate Public Utility District No. 1 of Snohomish County, Washington (PUD Snohomish) receiving the audiotapes. Indeed, PUD Snohomish's counsel

acknowledged this in a status report to the Administrative Law Judge, in which she stated: "Snohomish also extends its gratitude to the FERC Trial Staff for facilitating this access." (February 12, 2004 Status Report to Administrative Law Judge Isaac Benkin). Nor did trial staff seek to block from consideration the "smoking gun Enron strategy memoranda," as you assert in your June 14 letter. Rather, in the context of a motion that, for procedural reasons, sought to exclude certain proffered evidence, trial staff inadvertently referenced the exhibit number of the Enron strategy memoranda, an error that was subsequently and quickly remedied by trial staff. (Errata to Motion to Strike of the Commission Trial Staff April 30, 2004). Significantly, staffs motion was denied in its entirety and the administrative law judge has made it clear that he intends to hear all evidence relating to Enron's gaming activities.

As I have previously advised you, the Commission has coordinated its investigative activities of Enron with other federal agencies, including the Department of Justice, the Securities and Exchange Commission, and the Commodity Futures Trading Commission. However, it was not possible for the Commission to obtain certain information relating to criminal investigations. In other words, while the Commission provided substantial amounts of material to other agencies to assist them in their criminal prosecutions, the other agencies often could not reciprocate for fear of compromising their criminal investigations.

With respect to Staff Exhibit No. 44 (S-44) which is the subject of your June 21 letter, the source of the e-mails contained in that exhibit is a database that was also collected

and controlled by the Department of Justice. In addition to trial staff, however, several entities were provided access to all files processed from that database, including the attorneys general of California, Oregon, and Washington. S-44 is not therefore something that the Commission or trial staff has tried to "suppress." Rather, consistent with trial staff's treatment of material that was obtained by and under the control of the Justice Department, trial staff filed S-44 pursuant to a protective order entered in a proceeding that was recently consolidated with the matter in which PUD Snohomish is participating. As a result of the consolidation, PUD Snohomish was given access to S-44 in February of this year, but has not sought to have the protective order lifted as to S-44.

Proceedings are still pending against Enron and I have instructed staff to aggressively pursue Enron within the bounds of the Commission's statutory authority. Moreover, as announced last week, I have requested that staff recommend what, if any, additional steps should be taken in light of the newly released information. This evidence has already been filed in the pending Enron gaming practices and business relationships case before Judge Benkin, discussed above.

Based on this record, the Commission has revoked the market based rate sales authority of two Enron power companies and six Enron gas companies. In addition, we currently are investigating the potential retroactive disgorgement of Enron's profits associated with "gaming" or other behavior in violation of the California ISO's or the California Power Exchange's tariffs or in violation of Enron's market-based rate authorization.

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I know that you understand the legal constraints that this Commission, like other agencies, must operate under. We cannot simply issue an order once we discover evidence of possible wrongdoing and we cannot always devise remedies of our own choosing. The law requires sufficient "due process" for proceedings such as ours. The ongoing hearings regarding Enron's gaming strategies and business relationships, Docket Nos. EL03-180 and EL03-137, are where these tapes and other evidence are being reviewed before judge Isaac Benkin, including a public hearing with witness cross-examination. Upon the conclusion of the hearing and the issuance of the Judge's decision, the full Commission will review the case. We also have pending before us an initial decision in Docket No. EL02-113 by Judge Carmen Cintron with respect to Enron's business relationships with El Paso Electric Company.

Since I have been on-the Commission, we have taken significant actions to remedy the situation within the strictures of the dysfunctional market and the lack of clear rules that existed at the time, including the adoption of market behavior rules in the tariff, of all holders of market-based rate sales authority. Had these tariff rules been in place during 2000, the Commission clearly would have had the legal ability to reach back to earlier time periods for disgorgement remedies. Since these rules were not in place, however, the limitations of the Federal Power Act's statutory remedies are what we have to work with. Section 206 of the Federal Power Act requires that remedies be prospective, i.e., refunds for unjust and unreasonable rates may not be required prior to the refund effective date allowed in the Federal Power Act. As I have testified to Congress over the past two years, the

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Commission's options for additional remedies are very limited. We have had success in the past in seeking disgorgement of past profits based on record evidence of specific tariff or order violations. This is what we are doing in the cases before the Judges.

I understand your sense of frustration over this necessary process, but I think customers would be poorly served if our decisions were overturned by the courts on review because we failed to follow the law. Thank you for your continued interest in this case and these issues. As is our practice, I will file a copy of your letter and my response in the pending docket.

s/ Pat Wood
Chairman

APPENDIX K — LETTER TO CONGRESSMAN LARSEN FROM THE FEDERAL ENERGY REGULATORY COMMISSION DATED JUNE 4, 2004

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN June 4, 2004

The Honorable Rick Larsen
United States House of Representatives
Washington D.C. 20515

Re: Enron Power Marketing, Inc., *et al.*, Docket Nos. EL03-77 and RP03-311, and Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2

Dear Congressman Larsen:

Thank you for your May 19, 2004 letter with regard to the Commission's decision to revoke the market-based rate authority of Enton's power trading arm effective as of June 25, 2003. You believe that Enron's trading operations were probably defunct as of June 25, 2003, and that the tapes of Enron trader conversations recently submitted to the Commission show that the fraudulent and manipulative activities at Enron occurred prior to June 25, 2003. For these reasons, you state that the revocation of market-based authority of the Enron power trading arm by the Commission no earlier than June 25, 2003, fails to relieve customers of the burdens of these companies' fraudulent practices or to ensure that electricity markets function fire from fraud and manipulation. You urge the Commission to impose stringent

penalties on companies found responsible for market manipulation and set an earlier revocation date to send a message to companies that such behavior will not be tolerated.

The Commission takes very seriously your concerns about market manipulation. Unfortunately, the Commission has no authority under the Federal Power Act (FPA) to levy civil penalties for the market manipulation that occurred in the Northwest. Thus, as I have stated in my testimony before Congress, I support strong civil penalty authority for the Commission to address and prevent market abuses.

Next, you ask-the Commission to set back the date of revocation to when it became clear that Enron was manipulating energy prices. On March 26, 2003, the Commission issued a show cause order finding that several Enron entities apparently violated Section 205(a) of the FPA by engaging in gaming; and acted inconsistently with their market-based rate authority, not only by engaging in gaming, but also by failing to inform the Commission in a timely manner of changes in their market shares by gaining influence/control over others' facilities in violation of their market based rate authority. *Enron Power Marketing et al.*, 102 FERC ¶ 61,316 (2003). The Commission directed the Enron entities to show cause why their authority to sell power at market based rates should not be revoked by the Commission. d Thereafter, on June 25, 2003, the Commission revoked the market-based rate authorities of these Enron entities. *Enron Power Marketing. Inc., et al.*,103 FERC ¶ 61,343 (2003) *reh'g denied*, 106 FERC ¶ 61,024 (2004). This remedy taken against Enron marks the first time the Commission has taken such broad action against a company and its affiliates. I understand the need for strong and effective enforcement actions to serve as a deterrent for unlawful market behavior, and believe that the

revocation of market based rate authority of the Enron entities is such an action.

However, the Commission's authority to take such action under Section 206 of the FPA is prospective only; thus if we find that rates no longer meet the just and reasonable standard, we are authorized only to fix a new rate or to fix practices "to be thereafter observed." 16 U.S.C. § 824e (a) (2000). Additionally, FPA Section 206 provides the Commission with limited refund authority. Section 206 of the FPA requires the establishment of a refund effective date no earlier than 60 days after the date a complaint is filed or the Commission initiates an investigation on its own motion. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 96 FERC ¶ 61,120 at 61,504-5 and 61,508, *order on reh'g* 97 FERC 161,275 at 62,198-99 (2001). Therefore, FPA Section 206 does not permit retroactive refund relief for rates covering periods prior to the refund effective date established on complaint or the initiation of a Commission investigation, even if the Commission determines that such past rates were unjust and unreasonable.

Your letter and this response will be placed in the public file in the above-captioned docket, which serves to alert the Commission to the concerns of interested individuals and groups. If I can be of further assistance to you, please do not hesitate to contact me.

Best regards,

s/ Pat Woods, III
Pat Woods, III
Chairman

(2)

No. 04-621

IN THE

Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
Petitioner,

v.

DYNEGY POWER MARKETING, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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January 6, 2005

(Additional Counsel Listed On Signature Page)

QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that the Federal Power Act bars state law claims seeking to recover alleged overcharges in federally regulated wholesale electricity rates and to enjoin conduct affecting such rates.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondent Duke Energy Trading and Marketing, L.L.C. ("DETM") is a limited liability company owned by DETMI Management, Inc. ("DETMI") and Mobil Natural Gas, Inc. ("Mobil Gas"). DETMI, which owns a 60 percent voting and economic interest in DETM, is wholly owned by Duke Energy Corporation, a publicly held corporation. Mobil Gas, which owns a 40 percent voting and economic interest in DETM, is wholly owned by ExxonMobil Corporation, a publicly held corporation.

Respondent Dynegy Power Marketing Inc. is, through intermediate holding companies, a wholly owned subsidiary of Dynegy Inc., a publicly held corporation. A minority interest in excess of 10 percent of the stock of Dynegy Inc. is held by Chevron USA Inc., which in turn is a wholly owned subsidiary of ChevronTexaco Corporation, a publicly held corporation.

Respondent NRG Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of NRG Energy, Inc.

Respondent Powerex Corp. is wholly owned by the Province of British Columbia, Canada, through the Province's ownership of its parent, the British Columbia Hydro and Power Authority, a provincial crown corporation. No publicly held corporation owns any stock of Powerex Corp.

Respondent Reliant Energy Services, Inc. is a wholly owned subsidiary of Reliant Resources, Inc. Reliant Energy, Inc., a publicly held corporation, owns more than 10 percent of the stock of Reliant Resources, Inc.

Respondents Sempra Energy Trading Corp. and Sempra Energy Resources are wholly owned subsidiaries of Sempra Energy Solutions, which is an indirect wholly owned subsidiary of Sempra Energy, a publicly held corporation.

Williams Energy Marketing and Trading Company changed its name to Williams Power Company, Inc. on August 12, 2003. Respondent Williams Power Company, Inc. is a wholly owned subsidiary of Williams Merchant Services Company, Inc., which is a wholly owned subsidiary of The Williams Companies, Inc., a publicly held corporation.

Respondent Xcel Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of Xcel Energy, Inc.

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IN THE

Supreme Court of the United States

No. 04-621

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
Petitioner,

v.

DYNEGY POWER MARKETING, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioner (sometimes referred to as "Snohomish") is a municipal utility district in the State of Washington which claims that it paid excessive prices for wholesale purchases of electricity as a result of the California energy crisis of 2000-2001. Snohomish asserts no federal claim in this case, which seeks damages and injunctive relief under California's antitrust law (the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.*) and Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*). The complaint alleges that Snohomish was injured by "spill over" effects from the California market, where the respondent generators and marketers allegedly engaged in manipulative conduct violating those California statutes.

The district court dismissed the complaint on the basis of this Court's decisions holding that the Federal Power Act ("FPA") preempts matters relating to wholesale elec-

tricity prices, including *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). In addition to field and conflict preemption, the district court relied, as an alternative basis for its ruling, on the filed rate doctrine most recently reaffirmed in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 47 (2003). The court of appeals unanimously affirmed on the same alternative grounds, referring to two recent unanimous decisions to the same effect by other Ninth Circuit panels.

Snohomish's petition asks this Court to proclaim that there can be no federal preemption – and therefore the State of California is free to require refunds of wholesale electricity prices and regulate future price-related conduct – because the Federal Energy Regulatory Commission ("FERC") has approved a restructuring of the California energy market in which traditional cost-based rate tariffs have been replaced by tariffs providing for market-based rates determined by the operation of FERC-regulated structural mechanisms. The courts below held that this restructuring did not limit the preemptive effect of the FPA because, in the court of appeals' words, it remains no less true that "FERC has exclusive jurisdiction over interstate sales of wholesale electricity, and continues to engage in regulatory activity." Pet. App. 3a; *see id.* at 24a. That conclusion conforms with this Court's longstanding precedents and the decisions of other courts of appeals.

In the absence of any conflict with the decisions of this Court or any other court of appeals, there is no occasion for plenary review by this Court. Moreover, the fact that the decision below was based on three alternative grounds would independently make this case inappropriate for further review by this Court.

STATEMENT

A. The Regulatory Background

As this Court reiterated in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*,

> [FERC] regulates the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b). In this capacity, FERC must ensure that wholesale rates are "just and reasonable," § 824d(a).

539 U.S. at 41. Historically, of course, FERC exercised this regulatory jurisdiction by requiring the filing of tariffs containing cost-based rate schedules. But as the court of appeals explained:

> In 1996, California changed this cost-based system of setting wholesale electricity rates to a market-based system, where the rate was determined in a structured market. . . . The [California] legislation created two non-governmental entities to operate markets and otherwise manage the sale of electricity: the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). These entities were subject to FERC's regulation.

Pet. App. 4a.

FERC authorized this restructuring in a series of orders approving structural tariffs filed by the PX and ISO to regulate the operations of the California wholesale electricity markets, as well as approving participants' individual tariffs providing for market-based prices. The PX (which no longer operates) conducted an auction market where the mechanisms set forth in its FERC tariff set the market-wide price at any given time by analyzing the offers and bids submitted by buyers and sellers. The ISO's FERC tariff provided mechanisms for management of the transmission grid and additional markets, including a "spot" market, which were structured to assure constant balance between supply and demand. The respondent generators and marketers participated in the PX and ISO markets pursuant to their individual FERC tariffs author-

izing market-based rates, and subject to the further requirement that they formally agree to comply with the PX and ISO tariffs. *See id.* at 7a-9a, 14a. In sum, "[t]he allegedly improperly inflated rates paid by [petitioner] are those that resulted from the tariffs filed and approved by FERC." *Id.* at 20a.

In approving the PX and ISO tariffs, FERC determined that they constituted an appropriate means of assuring just and reasonable rates. Its approval of the individual seller tariffs was based on its determination that each of the market participants lacked or had mitigated market power, and was subject to the requirement that they file periodic reports so that FERC can reassess that determination and the reasonableness of actual prices. *See id.* at 8a-9a. Thus, "the rates paid by wholesale buyers remained subject to FERC jurisdiction, and subject to FERC review." *Id.* at 24a.

FERC has been actively exercising its jurisdiction over the California wholesale electricity market, including the events of 2000-2001 about which petitioner complains. The Commission is addressing these issues in several proceedings, including the multifaceted docket captioned *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, etc.* ("*SDG&E v. Sellers*"). *See* Pet. App. 16a. In a series of decisions in that proceeding, which FERC aptly calls the "California Refund Proceeding," FERC has acted to remedy potential flaws in the California market structure, and has provided for the calculation of refunds for charges determined to exceed the just and reasonable level. *See SDG&E v. Sellers*, Order Directing Remedies for California Wholesale Electric Markets, 93 F.E.R.C. ¶ 61,294 (Dec. 15, 2000); *id.*, Order Directing Sellers to Provide Refunds of Excess Amounts Charged for Certain Electric Energy Sales, etc., 94 F.E.R.C. ¶ 61,245 (Mar. 9, 2001); *id.*, Order Establishing Evidentiary Hearing Procedures, Granting Rehearing in Part, and Denying Rehearing in Part, 96 F.E.R.C. ¶ 61,120 (July 25, 2001); *id.*, Order on Proposed Findings on Refund Liability, 102

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Additionally, FERC has issued an Order to Show Cause, addressed to most of the present respondents, looking toward an administrative hearing on allegations of "gaming and/or anomalous market behavior in violation of the [ISO and PX] tariffs during the period January 1, 2000 to June 20, 2001, that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies." *American Elec. Power Serv. Corp., et al.*, Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, 103 F.E.R.C. ¶ 61,345, at ¶ 1 (June 25, 2003), *rehearing denied*, 106 F.E.R.C. ¶ 61,020 (Jan. 22, 2004). FERC has also issued detailed rules to govern market behavior in wholesale electricity markets, incorporating those rules in all existing market-based rate tariffs. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Order Amending Market-Based Rate Tariffs and Authorizations, 105 F.E.R.C. ¶ 61,218 (Nov. 17, 2003). Those rules prohibit any "[a]ctions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products." *Id.* at App. A ¶ 2. The rules further provide for disgorgement of any unjust profits from violation of the prohibition, as well as revocation of an offender's authority to sell at market-based rates. *Id.* ¶ 6. The Ninth Circuit has recently held that FERC's "broad remedial authority to address anticompetitive behavior" also extends to providing refund remedies for failures to comply fully with the periodic reporting requirements. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16 (9th Cir. 2004) (reproduced at Pet. App. 99a, 117a-118a).

B. Proceedings Below

This case, like a number of other cases seeking judicial remedies for alleged wrongdoing in the California electricity market, was assigned by the Judicial Panel on Multidistrict Litigation to Judge Robert H. Whaley of the Eastern District of Washington, sitting by designation in the Southern District of California. Judge Whaley dismissed the complaint in a thorough opinion. Pet. App. 12a-37a (reported at 244 F. Supp. 2d 1072). The dismissal was based on three alternative grounds: (1) that the filed rate doctrine bars claims, like petitioner's, challenging charges under FERC-approved tariffs and related practices (*id.* at 17a-26a); (2) that Congress has federally preempted the field of wholesale electricity rates through the FPA (*id.* at 28a-30a); and (3) that petitioner's "state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates" (*id.* at 31a).

The Ninth Circuit, which has had a series of appeals arising from the California crisis (*see, e.g., id.* at 3a-4a, 31a), affirmed on essentially the same three alternative grounds. *Id.* at 1a-11a (reported at 384 F.3d 756). Like the district court, the court of appeals rejected petitioner's contention that the replacement of traditional cost-based rate tariffs with the FERC-supervised PX/ISO structures for setting market-based rates removed the jurisdictional foundations for federal field and conflict preemption and application of the filed rate doctrine. The court of appeals relied on the more detailed analysis of these doctrines in two recent decisions by other panels: *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004) (field preemption and filed rate),[1] and *Public Utility District No. 1 of Gray's Harbor County v. Idacorp Inc.*, 379 F.3d 641 (9th Cir. 2004) (field preemption, conflict preemption, and

[1] Amended on denial of rehearing, 387 F.3d 966 (9th Cir. 2004).

filed rate). In particular, the court below relied on the conclusion in *Gray's Harbor*, just a week earlier, that

> the district court was precluded from giving the plaintiff the relief it sought because, to award that relief, the district court would have had to determine a "fair price." . . . [T]his would interfere with FERC's exclusive jurisdiction to set wholesale rates and was therefore barred by field preemption, conflict preemption and the filed rate doctrine.

Pet. App. 9a-10a.

REASONS FOR DENYING THE PETITION

Contrary to the petition's overwrought argument, the decision below does not present any issue meriting this Court's review. There is no conflict, and the decision rests comfortably on basic principles of federalism and preemption that have been settled in this Court for decades.

Petitioner does not dispute that the rates it challenges are interstate wholesale rates, and that they fall within FERC's statutory jurisdiction. Claims for state law remedies with respect to interstate electricity rates were barred under the dormant Commerce Clause even before the Federal Power Act became effective. *See, e.g., Public Utils. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927). And this Court has repeatedly confirmed that "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . . This was done in the Power Act by making [the federal agency's] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Southern California Edison*, 376 U.S. at 215-16; *see also Nantahala Power & Light*, 476 U.S. at 966; *New York v. FERC*, 535 U.S. 1, 20-22 (2002).

This bright line bars both state regulation and litigation under state law. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981).

> The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.

Mississippi Power & Light, 487 U.S. at 375; *see id.* at 377 (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

1. This case does not present any unsettled issue regarding the filed rate doctrine, much less do so in a framework suitable for this Court's review.

The petition largely focuses on the filed rate doctrine, arguing that it cannot apply where specific rates are not literally "filed" for advance review as they were under traditional cost-based tariffs. Even if that argument articulated an unresolved question, it would not warrant this Court's review because the decision below relied on the filed rate doctrine only as an alternative ground. The court of appeals' judgment rests independently on settled principles of both field preemption and conflict preemption, each of which was itself an alternative ground for decision. This case would thus be an inappropriate vehicle for further review unless this Court deemed that all three of these issues warranted plenary consideration, including a revisitation of this Court's settled precedents on field and conflict preemption.

In any event, there is no open question regarding the applicability of the filed rate doctrine here, in view of this Court's very recent decision in *Entergy* applying that doctrine to a similarly nontraditional tariff structure. *Entergy* – which the petition does not mention – held that state law was preempted under the filed rate doctrine notwithstanding the nonspecific nature of the FERC tariff in question, which "delegate[d] discretion to the regulated entity to determine the precise cost allocation" between affiliated companies that was being challenged. 539 U.S. at 42. This Court held that the cost allocation "consti-

tutes 'the sale of electric energy at wholesale in interstate commerce'" within the meaning of the FPA. *Id.* at 43 n.1. It then rejected the argument that the filed rate doctrine is limited to tariffs providing "specific mandates," holding that "[i]t matters not whether FERC has spoken to the precise classification . . . , but only whether the FERC tariff dictates how and by whom that classification should be made." *Id.* at 49-50. The ISO and PX tariffs and participants' individual tariffs similarly dictate "how and by whom" rates will be established, subject to FERC's review.

The court of appeals' interpretation of the filed rate doctrine is also consistent with the decisions in other circuits. The First Circuit has likewise rejected claims that "the filed rate doctrine should not apply where the 'regulated' rates have been left to the free market." *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). There, as here, it sufficed that "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review." *Id.* Decisions by the D.C. Circuit hold more broadly that market-based rate tariffs are entitled to the same respect and legal effect under the FPA (and the equivalent Natural Gas Act) as traditional tariffs that list specific rates. *See Elizabethtown Gas v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998).

The filed rate cases on which petitioner relies are irrelevant, particularly in the federal-state preemption context in which that doctrine was applied below. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), held only that the Interstate Commerce Commission was required to enforce a filed tariff as published and could not authorize secret negotiations inconsistent with the tariff. *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994), held that a motor carrier could not enforce a tariff that did not comply with regulations promulgated

by the Interstate Commerce Commission. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), held that the Federal Communications Commission could not, consistent with the Communications Act of 1934, excuse telephone carriers from filing any tariff at all. None of the filed rate cases cited in the petition involved market-based tariffs or analogous tariffs, and all preceded this Court's *Entergy* decision.

2. The court of appeals' alternative holdings of field and conflict preemption are plainly mandated by this Court's precedents and do not conflict with any other appellate decision.

Petitioner's argument with respect to field and conflict preemption does not address this Court's precedents establishing that the FPA precludes any state law remedy which, like that sought by petitioner, would alter interstate electricity rates. *Entergy* confirms that the fact that the tariffs do not specify precise numerical rates makes no difference in these contexts as well, because the tariffs do dictate by whom and how rates will be determined in a market structure that FERC has approved – subject to ongoing review – as calculated to result in fair and reasonable charges. "[T]he 'view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings' has been 'long rejected.'" *Entergy*, 539 U.S. at 50 (quoting *Mississippi Power & Light*, 487 U.S. at 374). The controlling factor is that the actual charges determined by operation of the individual respondents' tariffs and the price-setting mechanisms specified in the PX and ISO tariffs remain fully subject to the FPA and FERC's exclusive ratemaking jurisdiction. As noted above, FERC is actively exercising that jurisdiction over the very subject matter of this complaint.

Petitioner's contention that preemption is improper because it leaves California's antitrust and unfair competition laws unenforced ignores the fundamental nature of preemption:

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.

Arkansas Louisiana Gas, 453 U.S. at 584.

The decision below does not call into question the broad principle that the FPA does not provide blanket antitrust immunity for the electric power industry. That principle, which is in any event not without qualifications, does not extend to permitting state courts (or federal courts applying state law) to regulate interstate electricity rates by providing refunds whenever they are deemed to have been anticompetitive. The case on which petitioner principally relies in this respect, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), did not involve any question about preemption of state remedies. *Otter Tail* merely held – as the district court explained, *see* Pet. App. 35a-36a – that the FPA did not impliedly repeal the *federal* antitrust laws with respect to a subject (the wheeling of power) that was then outside the statutory jurisdiction of FERC's predecessor. Indeed, this Court noted that any issue concerning rates and conditions of service would be under the jurisdiction of the federal Commission. *See* 410 U.S. at 375-376.

The refunds that petitioner seeks under state law would necessarily intrude upon and conflict with the jurisdiction that is solely entrusted to FERC under the FPA and that FERC is actively exercising. Accordingly, petitioner's complaint is plainly barred, as the courts below held, by both field and conflict preemption. It is barred by field preemption because it is an "effort to invade the province of federal authority," *Mississippi Power & Light*, 487 U.S. at 377. And it is barred, alternatively, by conflict preemption because it would "stand[] as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), by "present[ing] the 'prospect of interference

with the federal regulatory power'" over rates, *id.* at 310 (citation omitted).

This Court has consistently rejected petitioner's argument that preemption can be avoided by characterizing the sought-for state law remedy as complementing or augmenting the federal scheme established by Congress. *See Nantahala Power & Light*, 476 U.S. at 966 ("'[O]ur decisions have squarely rejected the view . . . that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.'") (quoting *Southern California Edison*, 376 U.S. at 215); *see also United States v. Locke*, 529 U.S. 89, 115 (2000).

Petitioner cites no case – much less any federal court of appeals decision – where a complaint seeking recovery of allegedly excessive federally regulated rates was allowed to proceed under state law.[2] The only decision that the petition characterizes as creating a specific conflict in the lower courts, *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), did not involve any preemption issue or state law claim. Rather, that decision concerned the intersection between the federal Bankruptcy Code and the Federal Power Act, holding only that the bankruptcy court could

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[2] *Younger v. Jensen*, 605 P.2d 813 (Cal. 1980), held only that the Natural Gas Act did not preclude the California Attorney General from conducting an *investigation* into possible antitrust violations. The state court was at pains to emphasize that "[t]he issue posed . . . [was] not the validity of hypothetical steps California might take to *enforce* its antitrust laws," *id.* at 817 (emphasis added), and it noted that one purpose of the investigation could be merely "recommendations for remedial administrative rulings," *id.* at 818.

Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991), did not involve, as this case does, a claim that a seller's prices were unlawful, but rather a claim that a monopoly pipeline refused to carry cheaper gas that the plaintiffs could have purchased from certain third-party sellers. The Seventh Circuit simply noted, consistent with *Otter Tail*, that the pipeline was not categorically immune from antitrust liability and then proceeded to affirm a judgment in the defendant's favor.

authorize rejection of an executory contract for purchase of electricity by the debtor.[3] There is thus no colorable claim of conflict for this Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3] Even in the bankruptcy context, *Mirant* does not at all hold that courts can entertain any claim so long as the effect on FERC-regulated rates is only "indirect" (Pet. 24). In holding that Congress did not intend that the FPA should deprive utilities of a fundamental remedy provided by the Bankruptcy Code, the Fifth Circuit noted that the seller retained an unsecured claim for breach of contract "based on the amount of electricity it would have otherwise sold to Mirant *at the filed rate*." 378 F.3d at 520. The court deemed its holding consistent with this Court's holding in *Arkansas Louisiana Gas*, 453 U.S. at 584-85, that "courts are preempted from awarding . . . damage awards calculated using a rate other than the rate filed with FERC." 378 F.3d at 519.

Respectfully submitted,

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IN THE

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PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a municipal corporation in the State of Washington,

Petitioner,

v.

DYNEGY POWER MARKETING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*,
56 Vand. L. Rev. 1591 (2003) 3

Notwithstanding Respondents' substantial efforts to minimize conflicts, the decision below squarely conflicts with precedent from this Court and other circuits holding that (i) the filed rate doctrine does not apply in the absence of validly filed rates and (ii) the Federal Power Act ("FPA") does not preempt antitrust enforcement. Moreover, the petition presents the Court with an opportunity to resolve important and recurring federal issues that remain unsettled in the arena of deregulating electricity and natural gas markets.[1] The filed rate doctrine and the Ninth Circuit's expansive view of preemption have no place in a market-based regime, and the Court should accept review in order to reinforce its precedents establishing the narrowness of the filed rate doctrine and the limits of FPA preemption; reinforce the plenary role of state competition laws in deregulated markets; and rationalize conflicting law in the circuits on these issues. If this Court does not review the decision below, it will be used as precedent in scores of cases now working their way through the courts that arise from manipulation of the electricity and gas markets in various areas of the country. Dozens of cases will be influenced by the Ninth Circuit's startling departure from precedent.

1. The Ninth Circuit's decision squarely conflicts with precedent from this Court and other circuits holding that the filed rate doctrine does not apply in the absence of validly filed rates.

a. Respondents do not deny that this Court has never applied the filed rate doctrine to instances in which rates were not filed – the precise fact pattern at issue in this case. Instead, in an effort to minimize the manifest conflict between the Ninth

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[1] In stark contrast to the Ninth Circuit's omnibus rejection of the plethora of cases involving electricity markets, cases arising from the manipulation of natural gas markets during a similar time period continue to move forward in California state courts. For instance, on December 21, 2004, the California Court of Appeal, Fourth Appellate District, Division One, denied an interlocutory appeal in the *Natural Gas Antitrust Cases*. *See* Pet. at 10 n.11 (referencing trial court decision).

Circuit's ruling and this Court's prior decisions, Respondents offer a strained interpretation of *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), claiming that the tariff at issue need only dictate "how and by whom" rates will be established instead of setting forth the actual rates or formulae from which the actual rates can be derived. *See* Opp. 8-9. *Entergy* stands for no such proposition.

Entergy, and the two decisions upon which *Entergy* relied,[2] did not involve tariffs containing prices at which electricity was sold but, rather, tariffs setting forth the mechanisms by which FERC decides cost allocations from which state commissions establish retail rates. 539 U.S. at 42. To the extent that a state commission takes action that runs counter to FERC-approved cost allocations, the state order impermissibly "traps" costs that have been allocated in a FERC tariff and therefore impermissibly conflicts with that tariff. *Id.* at 49. Thus, there was a direct conflict between a state regulatory order and the costs specifically allocated by a FERC tariff. Of course, such a direct conflict between FERC and state agency action is not remotely at issue here, where rates – let alone costs – have not been determined by ***any*** regulatory body but left to the marketplace.

Furthermore, even though the tariff at issue in *Entergy* left certain cost allocation decisions to the discretion of an operating committee (*i.e.*, the cost allocations were not specific mandates), the statute at issue expressly authorized inclusion of such "automatic adjustment clauses" in the FERC-approved tariff, and the Court saw "no reason to create an exception to the filed rate doctrine for tariffs of this type that would substantially limit FERC's flexibility in approving cost allocation arrangements." *Id.* at 49-50. In contrast, here Congress has not modified the FPA to alter the rate filing requirements of Section 205.

Thus, *Entergy* does not in any way represent a contraction of the Court's strict requirement that ***rate*** tariffs contain all

[2] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

essential elements before the filed rate doctrine will apply, as held in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Security Servs. v. Kmart Corp.*, 511 U.S. 431, 439-40 (1994).

b. Respondents' reliance on *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), is also misplaced. There, the relevant rates and termination charge were individually filed with FERC, *id.* at 419, rendering as *dicta* the court's prediction that the filed rate doctrine would apply as long as rates remained subject to a just and reasonable agency review. Such *dicta* is ***directly*** at odds with *Maislin*, *Security Services*, and *MCI Telcoms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994), as this Court has never upheld application of the doctrine based on general principles of agency oversight.[3] Nor does *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), help Respondents because the court explicitly refused to reach issues related to the filed rate doctrine, which were not properly raised. *Id.* at 871.[4]

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[3] *Norwood* also conflicts with *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995) ("FP&L"), and *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 495 (D.C. Cir. 1985), which held that the doctrine cannot apply in the absence of filed rates even where the relevant agency exercised extensive regulatory oversight. *See* Pet. 12-13. And *Norwood*'s application of the filed rate doctrine to the partially deregulated power industry has been rightly criticized as an obstacle to competitive markets because the doctrine values regulatory over market-price determinations. *See* Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 Vand. L. Rev. 1591, 1648 (2003).

[4] Nor did *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), cited by Respondents in tandem with *Elizabethtown* (*see* Opp. 9), discuss the filed rate doctrine (or, for that matter, rates). Moreover, *Elizabethtown* held only that FERC could rely on "market discipline" to ensure just and reasonable rates. Of course, the availability of antitrust remedies helps maintain such market discipline.

c. Nor can Respondents effectively distinguish *Maislin*, *Security Services*, and *MCI*. Respondents claim that these decisions are "irrelevant" because they did not involve market-based tariffs. Opp. 9-10. Yet the regulatory regimes invalidated in this Court's plenary cases of *MCI* and *Maislin* are indistinguishable from FERC's shift to accepting market-based tariffs that do not contain rates. In each of those cases, the relevant agencies made rate filings optional where competitive forces were purportedly sufficient to ensure just and reasonable rates. *MCI*, 512 U.S. at 233; *Maislin*, 497 U.S. at 134. Here, a regime in which rates are not filed and reviewed by the agency *ex ante* is functionally equivalent to making rate filings optional. It is immaterial that FERC still requires the filing of a tariff. In *MCI*, *Maislin* ***and*** here, the fact remains that ***no*** rates were filed, and rates were not determinable or open to contemporaneous public inspection. Section 205(c) requires that the tariff contain "all rates and charges," and without rates, the doctrine ***cannot*** apply. *See also Security Servs.*, 511 U.S. at 439-40 (filed rate doctrine does not apply where the tariff lacks an essential element). As in *MCI*, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation . . . to a scheme of rate regulation only where effective competition does not exist." *MCI*, 512 U.S. at 231-32.

The Ninth Circuit's decision thus squarely conflicts with this Court's decisions and those of at least two other circuit courts, because the market-based "umbrella" tariffs utilized by FERC constitute a blanket grant of authority to charge rates set in the market – rates that are not filed with, and reviewed by, FERC *ex ante* but which continually fluctuate with market prices. The decision below drastically departs from this Court's filed rate jurisprudence intended to narrowly proscribe application of this rule of immunity.

2. The Ninth Circuit expanded the scope of preemption in a manner that conflicts with other courts and invokes important and recurring federal issues that remain unsettled.

a. Respondents do not contest, nor could they, that FERC is powerless to enforce antitrust laws or impose antitrust penalties, because this point has been well settled for decades. *See, e.g., California v. Federal Power Comm'n*, 369 U.S. 482, 490 (1962); *see also Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir. 1982); *Alabama Power Co. v. Federal Power Comm'n*, 511 F.2d 383, 393 (D.C. Cir. 1974).[5] Nonetheless, the decision below maintains that the FPA preempts all competition laws – leaving a huge regulatory gap clothing defendants with *de facto* immunity. The FPA's preemption of wholesale rate regulation simply does not extend to preempt antitrust law in the absence of rate regulation.

Not surprisingly, then, this Court applies competition laws to energy markets. *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973). Respondents attempt to distinguish *Otter Tail* on the basis that it did not involve preemption of state remedies. Opp. 11. Yet *Otter Tail* and its progeny create a rule of general application: antitrust laws apply to the power industry – ***including the wholesale market*** – notwithstanding the broad regulatory reach of the FPA. Notably, no exception to this general rule can be found for instances in which preemption is raised as a defense to state law claims. Simply put, if the entire regulatory field of wholesale electricity was preempted, decisions such as *Otter Tail*, and *Groton v. Connecticut Light &*

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[5] FERC itself has repeatedly endorsed this principle. *See, e.g., San Diego Gas & Elec. Co. v. Sellers, 95 FERC ¶ 61,418, 2001 FERC Lexis 1440, at *95 (June 19, 2001)* (FERC cannot impose penalties or treble damages); *Energy Servs., Inc. & Gulf States Utils. Co.*, 64 FERC ¶ 61,326 at 63,404-05, 1993 FERC Lexis 1947, at *4 (Sept. 22, 1993) ("the Commission does not have jurisdiction to determine violations of the antitrust laws").

Power Co., 456 F. Supp. 360 (D. Conn. 1978), which provide for liability in the arena of wholesale electricity, would not exist.[6]

The Ninth Circuit decision also ignores this Court's holding that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). Applying competition laws to a ***market-based*** pricing regime in which no rates are filed cannot be plainly repugnant to the regulatory scheme. Indeed, if the FPA did not preempt all antitrust actions in the cost-based rate-filing era, it logically cannot preempt them now that market mechanisms determine rates. ***If anything, the range of preemption should be contracted, because there is less regulatory oversight and therefore a greater need for the effective policing of markets.*** The Ninth Circuit has thus failed to acknowledge this Court's very limited view of implied antitrust repeal and has created a precedent that dangerously expands preemption and thus creates a regulatory gap – one that allows blatant market manipulation by the likes of Enron – to go unchecked.

b. The Ninth Circuit's finding of omnibus preemption also conflicts with *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614 (11th Cir. 1995), where breach of contract and federal and state antitrust claims were brought against a utility for failing to provide network service. Although FERC had approved the rates associated with "point-to-point" transmission service, it had not approved any rates associated

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[6] The *Groton* court appropriately rejected an all-encompassing application of preemption and advocated a particularized inquiry into whether application of antitrust laws to wholesale electricity markets would interfere with FERC's regulatory scheme. *Id.* at 367. On the facts before it, the court ultimately concluded that it would not because FERC had never approved the anticompetitive conduct at issue. *Id.* The Ninth Circuit's omnibus preemption ruling here conflicts with the more enlightened *Groton* approach.

with network service. *Id.* at 615. Consequently, the court found that, even though the damage claims involved wholesale electricity rates subject to FERC regulation, those claims could proceed because FERC did not approve the specific rates in question. *Id.* at 616. Indeed, the court held that if no tariff specified the rate at issue, the district court could, "for the limited purpose of calculating damages, ***estimate the rate that would have been in effect but for the violation without infringing on the FERC's jurisdiction***." *Id.* at 617 (emphasis added).

Thus, the FPA does not universally bar damage awards in cases that involve wholesale electricity sales. The fact that damages for defendants' illegal trading practices may be calculated by estimating the price that should have been charged in the absence of such conduct does not "infringe[] on the FERC's jurisdiction" where no rates were approved in the first instance (and particularly where, as here, Snohomish had no long-term contracts with defendants). The Ninth Circuit's holding that a damages award would intrude upon and conflict with FERC jurisdiction therefore directly conflicts with *FP&L*. An award here would not change a single FERC-approved contract or rate but would instead provide a remedy for abusive conduct while leaving untouched the FERC-jurisdictional rate embedded in the market-based contracts.[7]

c. Overlooking *FP&L*, Respondents find no conflict between the decision below and *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), purportedly because *Mirant* "did not involve

[7] The FERC proceedings that Respondents cite (Opp. 4-5) serve only to highlight the limitations on FERC's authority because any action that FERC may order is limited to revoking market-based rate authority and imposing refunds for tariff violations. Indeed, FERC acknowledged that it cannot "redress traumatic and inequitable circumstances like this" – let alone determine whether defendants conspired or colluded with other market participants or otherwise engaged in acts of unfair competition. *San Diego Gas & Elec. Co. v. Sellers*, 93 FERC ¶ 61,121, 2000 FERC Lexis 2168, at *98 (Nov. 1, 2000). Consequently, there is no reason that improper conduct cannot be both a violation of FERC tariffs ***and*** antitrust and consumer protection laws.

any preemption issue or state law claim." Opp. 12. But Respondents ignore the fundamental point established by the Fifth Circuit: FERC does ***not*** have exclusive jurisdiction over FERC approved rates where causes of action challenge something other than a filed rate. 378 F.3d at 519; *accord Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-73 (5th Cir. 1987) (the FPA does not preempt actions to set aside contracts obtained unconscionably or by fraud).[8] This is precisely the issue presented here, because Snohomish does not challenge rates that were filed and approved by FERC. Therefore, the Ninth Circuit's finding that FERC need only "do[] enough regulation to justify federal preemption of state laws" notwithstanding the use of market-based rates conflicts with the Fifth Circuit's narrower view that preemption must be tied to rates approved by FERC.[9]

Finally, ***none*** of the preemption cases cited by Respondents addressed the deregulation engendered by FERC's move to market-based rates. They therefore do not delineate the scope of preemption in substantially deregulated regimes and leave open an important, recurring and unsettled issue for resolution by this Court at this time.

3. The Court should accept review and clarify that the filed rate doctrine and preemption should not abrogate competition law in a market-based regime.

FERC engineered a paradigmatic shift from cost-of-service-based regulation to a very different approach that monitors markets by focusing on the structure of those markets and

[8] That *Mirant* was a bankruptcy case is immaterial, because – for purposes of conflict analysis – the conflict would be the same whether the court proceeds under state law jurisdiction or in bankruptcy. Furthermore, *Gulf States*, upon which *Mirant* relied, did not involve bankruptcy.

[9] Nor do *Entergy* and *Nantahala* support the sweeping preemption applied by the Ninth Circuit below and advocated by Respondents. Opp. at 10, 12. As noted, those decisions are limited to the cost "trapping" scenarios resulting from state commission interference with cost allocation methodology expressly approved by FERC.

requiring only *ex post* information filings containing little information about pricing. This new paradigm, coupled with the Ninth Circuit's ruling below and its prior recognition that FERC "abdicat[ed] its regulatory responsibility" during the electricity crisis (*see* Pet. 25), leaves energy markets with a critical enforcement gap unsupported by the FPA and this Court's jurisprudence. As one commentator has astutely observed:

> Because agencies often lack the authority or resources to implement effective regulation of competitive markets, the doctrine not only thwarts price flexibility on the part of regulators and private firms, but also precludes much contract, tort, fraud, and antitrust litigation against – as well as state regulation of – utilities. This creates an enforcement gap, given the limited reach of federal agency regulation. . . . [T]he filed tariff doctrine contributes to a widening of the enforcement gap in deregulated markets. As formerly regulated industries move towards open market competition, establishing market norms becomes more important than ever. The filed tariff doctrine, however, can result in a type of radical deregulation – markets absent common law and antitrust protections. [Rossi, *supra* note 3, at 1596.]

Restraining the operation of laws designed to protect market competition abrogates Congressional intent, for Congress could not have intended to preempt competition law in a market-based regime when it never intended to preempt competition law in the prior regulatory era where FERC, and not market mechanisms, set rates. Consequently, the Ninth Circuit's automatic application of the filed rate doctrine and preemption results in radical and unintended deregulation and leaves consumers and businesses without fundamental market protections and remedies.

The immediate consequence of this ungrounded result is that thousands of businesses and millions of consumers will

bear the damages for what is widely acknowledged to be patent wrongdoing by defendants during the Western energy crisis. But the Ninth Circuit's departure from the narrow confines of the filed rate doctrine, and its over-expansive view of preemption, has broader consequences: it vitiates any role for default state norms in deregulating industries generally, effectively precluding the ability of state and federal governments to police markets. Indeed, because of the enforcement gap that results, the Ninth Circuit's decision, if left standing, could actually discourage future deregulatory efforts nationwide.[10]

Respondents fail to address these critical policy arguments. Instead, they fallback to the "bright line" rule employed by this Court in cases involving a direct conflict between state agency action and matters specifically approved by FERC. Opp. 7. But ***none*** of those decisions dealt with the intersection of FERC power and private antitrust enforcement in deregulating markets. Accordingly, guidance from the Court on these issues is critical, and this case presents an excellent vehicle in which to provide it, particularly given the magnitude of cases presently pending in federal and state courts relating to the Western energy crisis and involving identical threshold legal issues. *See* Pet. 9-10.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

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[10] The filed tariff doctrine arises from a regulatory regime that values regulatory over market-price determinations. But such regulatory regimes only work if regulators are exercising effective regulation, which did not happen during the Western electricity crisis. Lacking adequate means to enforce antitrust remedies themselves, regulators are likely to be discouraged from loosening the reins of regulation if courts preclude the enforcement of competition laws by other governmental actors and by private parties that might be victimized by Enron-style abuses.

Respectfully submitted,

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No. 04-621

In the Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, PETITIONER

v.

DYNEGY POWER MARKETING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that federal law precluded petitioner's claims that respondents acted in violation of state antitrust and unfair competition laws in setting wholesale power rates subject to the jurisdiction of the Federal Energy Regulatory Commission.

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the decision below is correct and does not merit the Court's review.

STATEMENT

1. Under the Federal Power Act (FPA), 16 U.S.C. 791a, *et seq.*, all proposed rates, terms, and conditions for or in connection with the transmission and sale at wholesale of electric energy in interstate commerce must be "just and reasonable," 16 U.S.C. 824d(a), and not unduly discriminatory or preferential. 16 U.S.C. 824d(b). A complaint asserting that existing rates are unlawful is filed with the Federal Energy Regulatory Commission (FERC), which has the authority to investigate the complaint. 16 U.S.C. 824d(e). If, after a hearing on its own motion or on complaint, FERC determines that any existing rate or charge is

unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a). FERC "may order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b).

2. Before 1996, electricity rates in California were cost-based. Power suppliers filed tariffs with FERC setting forth their wholesale rates and gave FERC a detailed explanation of how they were derived. See, *e.g.*, 18 C.F.R. 35.13 (filing requirements for rate changes). Once FERC approved the tariff, the utility would have to charge the filed rate until the submission and approval of a new tariff by FERC. Pet. App. 3a.

In 1996, California adopted legislation comprehensively restructuring the State's electric industry, and in turn FERC approved a new system of market-based rates for wholesale transactions arrived at through use of a structured market. Under the state legislation, California's three major investor-owned utilities were required to divest a substantial portion of their power generation plants and to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse, known as the California Power Exchange (PX). See Pet. App. 102a-103a. The PX would operate an auction market for the purchase and sale of electricity in the "day-ahead" and "day-of" markets, and would set market-clearing prices applicable to all bids accepted by the PX. *Id.* at 4a.

The new legislation also created the California Independent System Operator (ISO) to manage the transmission network. As part of its network reliability responsibility, the ISO operated a real-time, or spot, market to balance supply and demand at precise points in time. Pet. App. 4a-5a.

3. On April 29, 1996, the three major investor-owned utilities filed applications with FERC seeking, *inter alia*, authority

to sell electric energy at wholesale at market-based rates. Pet. App. 103a-104a. In accordance with its established policy, FERC approved their requests for market-based rate authority after finding that the companies and their affiliates did not have, or had adequately mitigated, market power. See, *e.g.*, *Pacific Gas & Elec. Co.*,81 F.E.R.C. ¶ 61,122, at 61,437, 61,537, 61,572 (1997).

FERC had also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates, including in the California markets. In addition, the ISO and the PX filed comprehensive tariffs describing in detail how their markets would operate. FERC approved those tariffs, and FERC required each participant in the new markets to agree that the ISO and PX tariffs would govern all transactions in their markets. Pet. App. 7a-9a. The ISO and PX commenced operations in late March 1998. *Id.* at 104a.

4. In June 2000, California suffered an energy crisis that brought a sharp rise in wholesale electricity prices, frequent system emergencies along with occasional blackouts, and severe financial distress to California utilities, energy customers, and other market participants. See Pet. App. 2a, 104a-105a.

5. On July 26, 2000, FERC instituted a staff fact-finding investigation that identified three major factors contributing to the high spot market prices: (1) market fundamentals, such as significantly increased power production costs, increased demand due to unusually high temperatures, and a scarcity of available generation resources; (2) over-reliance on the spot markets as a result of the California Public Utilities Commission's requirement that the three investor-owned utilities buy and sell through the PX; and (3) the possible exercise of market power in the spot markets. *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,121, at 61,354-61,355, 61,359 (2000).

The confluence of those factors caused unjust and unreasonable rates for short-term energy under certain conditions. *San Diego Gas & Elec.*, 93 F.E.R.C. ¶ 61,121, at 61,349-61,350. To remedy the situation, FERC implemented structural and pricing reforms to make California and Western electricity markets more stable and less susceptible to unreasonable price spikes, including eliminating the requirement that investor-owned utilities buy and sell through the PX. See, *e.g.*, *In re California Power Exch. Corp.*, 245 F.3d 1110, 1114-1116 (9th Cir. 2001); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294, at 61,195 (2000), mandamus denied, 245 F.3d 1110 (9th Cir. 2001); see also Pet. App. 105a. After the adoption of those measures, by late June 2001, prices in California spot and forward markets fell back to preexisting competitive levels. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 95 F.E.R.C. ¶ 61,418, at 62,546 (2001).

6. FERC also initiated an evidentiary hearing in FERC Docket Nos. EL00-95 *et al.* (the Refund Proceeding) to determine refunds owed by suppliers in the California spot markets for sales at unjust and unreasonable rates. See generally *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 96 F.E.R.C. ¶ 61,120 (2001). The Federal Power Act establishes the earliest refund date as 60 days following the filing of a complaint. 16 U.S.C. 824e(b). Applying that rule, FERC set the earliest date for refunds as October 2, 2000. 96 F.E.R.C. ¶ 61,120, at 61,504. FERC set the termination date for refunds as June 20, 2001. *Id.* at 61,499. While FERC has authority under the FPA to direct additional remedies (including the disgorgement of profits) for tariff violations occurring during any time period, no violation of sellers' market-based tariffs had yet been demonstrated at the time the Refund Proceeding was initiated, and no additional remedies were accordingly adopted in that proceeding. See, *e.g.*, *id.* at 61,507-61,508.

FERC determined in the Refund Proceeding that customers are entitled to refunds of more than $1 billion. *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 101 F.E.R.C. ¶ 63,026 (2002). Subsequent orders have clarified the methodology used for calculating refunds, and have instructed the ISO and PX to recalculate bills for all sales during the refund period. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 110 F.E.R.C. ¶ 61,336 (2005); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,218 (2004); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 107 F.E.R.C. ¶ 61,165 (2004); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 105 F.E.R.C. ¶ 61,066 (2003); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 102 F.E.R.C. ¶ 61,317 (2003). (Petitions for review from refund proceeding orders have generally been consolidated in the Ninth Circuit, with the lead docket captioned *Public Utilities Commission* v. *FERC*, No. 01-71051.) When those recalculations are finalized, FERC will order final refunds and close the Refund Proceeding.

7. After uncovering evidence that Enron, one of the participants in the California market, had engaged in various market manipulation strategies, FERC initiated a separate, broad-based investigation into whether any entity manipulated short-term prices in Western energy markets during the time period commencing January 1, 2000. See *Fact-Finding Investigation of Potential Manipulation of Elec. & Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). FERC staff obtained voluminous electronic data, written materials, and data responses from all segments of the industry, as well as ISO and PX bidding data and expert testimony and analyses.

The Final Report prepared by FERC's staff concluded, *inter alia*, that the filed tariffs of the ISO and PX prohibited certain abuses of market power impairing the efficient operations of the ISO and PX markets, and the Report identified instances of al-

leged market power abuses and tariff violations. See FERC, *Final Report on Price Manipulation in Western Markets, No. PA 02-2-000* (Mar. 2003). FERC initiated a number of proceedings to examine instances of potential wrongdoing and to take remedial action as appropriate, even if the wrongdoing occurred before October 2, 2000. See *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Dynegy Power Mktg., Inc.*, v. *FERC*, No. 04-1036 (D.C. Cir.); *Investigation of Anomalous Bidding Behavior & Practices in the Western Markets*, 103 F.E.R.C. ¶ 61,347 (2003), reh'g denied, 106 F.E.R.C. ¶ 61,057 (2004), appeal pending *sub nom. City of Los Angeles Dep't of Water & Power* v. *FERC*, No. 04-1081 (D.C. Cir.).

In addition to the refunds ordered in the Refund Proceeding, the separate investigations of alleged misconduct constituting violations of FERC-filed tariffs have begun to result in settlements that provide additional relief for ratepayers. See, *e.g.*, *Fact-Finding Investigation into Possible Manipulation of Elec. & Natural Gas Prices*, 102 F.E.R.C. ¶ 61,108 (2003), reh'g dismissed, 104 F.E.R.C. ¶ 61,146 (2003) (agreement to pay $13.8 million for withholding of generating capacity on two days in June 2000), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 03-72874 (9th Cir.); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,257 (2004) (approximately $200 million to resolve all claims against Duke Energy); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 109 F.E.R.C. ¶ 61,071 (2004) (almost $300 million to resolve all claims against Dynegy, Inc. and NRG Energy); *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.* 108 F.E.R.C. ¶ 61,002 (2004) (approximately $140 million in resolution of FERC claims). In April 2005, FERC approved a settlement valued at more than $320 million of claims against Mirant Corp., one of the participants in the California market and a respondent in this case. See *San Diego Gas &*

Elec. Co. v. *Sellers of Energy & Ancillary Servs.*, 111 F.E.R.C. ¶ 61,017 (2005).

8. Petitioner, a utility serving a part of the State of Washington, filed a complaint in the United States District Court for the Central District of California against generators and traders who sold power in the California wholesale market, alleging the market manipulation and tariff violations that were the subject of FERC's investigation described above. Pet. App. 5a-6a. Petitioner alleged that "these practices caused [petitioner] 'to pay prices for electricity in excess of rates that would have been achieved in a competitive market.'" *Id.* at 6a. Petitioner sought injunctive relief and damages under the California Cartwright Act, Cal. Bus. & Prof. Code. §§ 16720 *et seq.* (West 1997) (California's antitrust law) and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 1997). Pet. App. 5a-6a.

9. The case was transferred to the Southern District of California. The district court held that petitioner's claims were barred by the filed rate doctrine, which precludes courts from setting or assuming a rate different from that approved by FERC. Pet. App. 20a-22a. The court explained that petitioner "specifically seeks as redress the difference between the charged rates and the different, hypothetical rates it believes would have 'been achieved in a competitive market.'" *Id.* at 20a. The court concluded that petitioner's claims were barred, because "in order to resolve [petitioner's] claims and provide the damages it seeks, the Court would be expressly required to assume 'a hypoethetical rate different from that actually set by FERC.'" *Ibid.* The district court also rejected petitioner's contention that the filed rate doctrine is inapplicable to market-based regulation, explaining that petitioner mischaracterized the nature and extent of FERC's oversight through the terms, formulas, and conditions of the PX and ISO tariffs. *Id.* at 23a-25a.

The district court also concluded that petitioner's claims were preempted, because "monetary relief to reduce past rates, and injunctive relief to regulate future conduct in the wholesale electricity market * * * cannot be granted without interfering with exclusive federal authority over wholesale power transactions." Pet. App. 26a. The court held that petitioner's claims were barred by field preemption because FERC has exclusive jurisdiction "over the regulation of interstate wholesale energy rates." *Id.* at 29a. The court also held that petitioner's "state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates." *Id.* at 31a. Especially in light of the ongoing proceedings before FERC, the District Court concluded "that any additional or different relief ordered by th[e] court would necessarily obstruct and frustrate FERC's proper regulatory efforts." *Id.* at 32a.

10. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioner's contention that preemption doctrines "should not apply when market-based rates are involved, because the market, and not FERC, is determining the rates." *Id.* at 7a. The court noted that FERC still "is doing enough regulation to justify federal preemption of state laws." *Ibid.* The court explained that, although market-based rates were in use in the California market, FERC continued to oversee wholesale electricity rates by reviewing and approving sellers' umbrella tariffs permitting sales at market-based rates, *ibid.*, requiring each seller to file quarterly reports regarding sales transactions, reviewing and approving the ISO and PX tariffs, *id.* at 8a, and, following the crisis, ordering disgorgement of profits resulting from the tariff violations alleged by petitioner, *id.* at 9a.

The court of appeals noted that it had previously concluded that, despite the fact that market-based rates were being used in the California market, state-law contract claims against an electricity wholesaler for rescission and restitution based on facts

similar to those alleged by petitioner here were preempted. Pet. App. 9a (citing *Public Util. Dist. No. 1* v. *Idacorp.*, 379 F.3d 641 (9th Cir. 2004) (*Grays Harbor*)). The court held that petitioner's claims "also ask the district court to determine the rates that 'would have been achieved in a competitive market'" and that they therefore "are barred by the filed rate doctrine, by field preemption, and by conflict preemption." *Id.* at 10a (quoting petitioner's complaint). The court held that petitioner's claim for injunctive relief is similarly barred, because it "encroach[es] upon the substantive provisions of the tariff, an area reserved exclusively to FERC, both to enforce and to seek remedy." *Id.* at 11a.

DISCUSSION

Insofar as petitioner attacks the validity of FERC's approval of market-based rates, such an attack must be presented in a petition for review of a FERC decision. It is not properly presented in determining a preemption issue in a private state-law suit in which FERC is not even a party. In any event, such an attack would be unsuccessful; decisions of the courts of appeals addressing similar attacks have uniformly concluded that FERC's approval of market-based rates does not violate the Federal Power Act. With respect to the issues that are presented in this case, the court of appeals correctly held that petitioner's state-law claims are preempted, because they are based on its complaints about rates charged in the interstate wholesale market for electricity, and it has long been settled that state law is ousted by FERC's jurisdiction over that field. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

A. Petitioner's Attacks On The Validity Of FERC's Market-Based Regulations Are Not Before The Court

1. As the court of appeals explained, although the precise prices at which electricity was to be sold in California were not

filed in advance, FERC did "continue[] to oversee wholesale electricity rates * * * by reviewing and approving a variety of documents filed by [respondents], the PX, and the ISO." Pet. App. 7a. FERC approved both the specific umbrella market-based rate tariffs of individual sellers and the tariffs of the ISO and PX, which contained market rules governing all sellers. The PX and ISO filings "described in detail how the markets operated by each entity would function" and "would govern all transactions in th[ose] market[s]," *id.* at 8a-9a; essentially, FERC approval of those tariffs, while not setting specific prices, set forth rules by which the specific prices would be determined.

Much of petitioner's argument depends on its contention that FERC's approval of the umbrella tariffs providing for market-based rates was invalid under the Federal Power Act, and that state law, which would otherwise be subject to preemption, can assume a role in that situation. For example, petitioner argues that, although the Federal Power Act requires that utilities "shall file * * * schedules showing all rates and charges for any transmission or sale," 16 U.S.C. 824d(c), "the market-based 'umbrella' tariffs utilized by FERC here constitute a blanket grant of authority to charge rates * * * that are not filed with, and reviewed by, FERC." Pet. 13. See *ibid.* (arguing that FERC's policy "deviates from the filing requirement" in violation of this Court's decision in *MCI Telecomms. Corp.* v. *AT&T*, 512 U.S. 218 (1994)); Pet. 27-28 ("Congress directed tight rate regulation, which was done by *ex ante* agency review and approval of rates or formulae from which rates could be ascertained * * *. But FERC's move to market-based tariffs abandoned the tightly regulated rate structure."); Reply Br. 4.[1]

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[1] Petitioner's repeated citations (*e.g.*, Pet. 6, 11) to *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), similarly attempt to present the question whether FERC's approval of the market-based tariffs was legal. *Maislin* held that the Interstate Commerce Commission's attempt to enforce a negotiated rate that differed from the filed rate was inconsistent with the

This case does not present an appropriate vehicle for addressing petitioner's argument that FERC acted inconsistently with the Federal Power Act in permitting market-based rates in the California market. Petitioner could have sought review in a court of appeals under 16 U.S.C. 825*l*(b) of FERC's orders granting market-based rate authority to sellers in the Pacific Northwest markets, where petitioner was a buyer and in which petitioner operated. Or, if petitioner was an "aggrieved" party under Section 825*l*(b), it could have challenged the orders of FERC authorizing the market-based PX and ISO system in California (which petitioner claims was interconnected with and affected the prices in the market in which it operates). Petitioner, however, did neither.

Challenges to FERC orders under the Federal Power Act must be brought directly in the court of appeals, under Section 825*l*(b), not through a collateral attack in district court under state law, in which FERC is not a party and in which the administrative record on which FERC's orders must be judged is not before the court. Under the FPA, any party bringing a challenge to a FERC order must satisfy certain prerequisites (*e.g.*, presentation of its claim in a petition for rehearing before FERC), and the FPA provides expressly that the court of appeals "shall have jurisdiction, which upon the filing of the record with it *shall be exclusive*, to affirm, modify, or set aside such order in whole or in part." 16 U.S.C. 825*l*(b) (emphasis added). "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts," because "[t]he only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Missis-*

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governing statute. Petitioner's claims, by contrast, are based on an attack on the filed tariffs, and they would require a court to enforce a rate dictated by state antitrust law rather than a rate that resulted from those tariffs. *Maislin* thus supports the court of appeals' result here and provides no support for petitioner's claims.

sippi Power & Light Co. v. *Mississippi*, 487 U.S. 354, 375 (1988). Cf. *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (on petition for review of FERC order, rejecting challenge to FERC's acceptance of market-based tariffs as inconsistent with FPA), petition for reh'g en banc pending (filed Oct. 25, 2004). Petitioner therefore may not collaterally attack FERC's regulation of the wholesale electricity market in a private state-law action, such as this one.

2. In any event, FERC's approval of the market-based rates in California fully complied with the FPA. The FPA grants FERC broad discretion as to how the statute's ratemaking mandates will be satisfied. While 16 U.S.C. 825d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, a ratemaking methodology to be followed. See *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 315 (1989) (FERC not bound to use any particular rate methodology).

In addition, the requirement of 16 U.S.C. 824d(c) that every public utility file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission" explicitly leaves the timing and form of those filings to FERC's discretion. "*Under such rules and regulations as the Commission may prescribe*, every public utility shall file with the Commission, *within such time and in such form as the Commission may designate*, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." *Ibid.* (emphasis added). Under the tariff applicable here, the Commission requires sellers to file quarterly reports detailing for each individual purchase and sale the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. *California ex rel. Lockyer* v. *British Columbia Power Exch.*, 99

F.E.R.C. ¶ 61,247, at 62,066 & n.44, on reh'g, 100 F.E.R.C. ¶ 61,295 (2002), aff'd in relevant part, 383 F.3d 1006, 1013-1014 (9th Cir. 2004).

Contrary to petitioner's assertions (Pet. 11-13), the courts of appeals have generally recognized that market-based rates are consistent with various requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see also *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994); *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). "[I]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Lockyer*, 383 F.3d at 1013 (quoting *Tejas*, 908 F.2d at 1004); see *id.* at 1014 ("market-based tariffs do not, *per se*, violate the FPA"). No court of appeals has held that FERC's approval of a market-based system such as that in California is inconsistent with the FPA's mandates.

B. The Court of Appeals' Conclusion Is Compelled By FERC's Exclusive Jurisdiction Over Wholesale Sales By Public Utilities, Including Their Wholesale Rates And Tariffs

1. This Court's decisions have long recognized that FERC (and its predecessor, the Federal Power Commission) have "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). The origins of that authority lie in the series of decisions leading up to *Public Utilities Commission* v. *Attleboro Steam & Electric*

Co., 273 U.S. 83 (1927), which held that the Commerce Clause precludes the States from regulating the wholesale sale of electricity in interstate commerce. Congress responded by enacting the Federal Power Act, "which denied state power to regulate a sale at wholesale to local distributing companies." *FPC* v. *Southern Cal. Edison*, 376 U.S. 205, 214 (1964) (internal quotation marks omitted). In enacting the FPA, Congress "meant to draw a bright line, easily ascertained, between state and federal jurisdiction, * * * by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* at 215-216.

The Court has since recognized that Congress granted authority to the Commission beyond that necessary to close the "*Attleboro* gap." *New York* v. *FERC*, 535 U.S. 1, 21 (2002).[2] Further, the Court has consistently held to the view that the authority granted to FERC over interstate wholesale sales of electricity, filling the "*Attleboro* gap" and beyond, is exclusive and ousts state authority in that area completely. See, *e.g.*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986). In *Southern California Edison*, the Court rejected a claim that the permissibility of state regulation of wholesale sales of electricity turns on a case-by-case "analysis of the impact of state regulation of the sale upon the national interest in commerce." 376 U.S. at 210-211. Instead, the Court emphasized, the FPA "cut sharply and cleanly between sales for resale and direct

[2] Petitioner therefore errs in contending (Pet. 18) that "Congress intended to limit FERC's jurisdiction under the FPA only to matters beyond state control and preserved state regulatory authority." See *New York* v. *FERC*, 535 U.S. at 21 ("It is, however, perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

sales for consumptive uses," which "left *no power in the states to regulate licensees' sale for resale in interstate commerce*, while * * * establish[ing] federal jurisdiction over such sales." *Id.* at 214-215 (emphasis added). "FERC has exclusive authority to determine the reasonableness of wholesale rates," and "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Mississippi Power & Light*, 487 U.S. at 371, 374.

2. If Congress acts in an area over which it has constitutional authority, "Congress may, if it chooses, take unto itself all regulatory authority * * *, share the task with the States, or adopt as federal policy the state scheme of regulation." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The clear import of this Court's holdings that FERC has exclusive jurisdiction over the interstate wholesale sale of electricity by public utilities is that, in this area, Congress has chosen the first alternative. Accordingly, any state law that would operate in that area, regardless of whether it would supplement or detract from federal law, is preempted.

Petitioner's state-law claims, if permitted to go forward, would assign a role to state law to govern the wholesale market in electricity in California. Under the FPA, electricity can be sold at wholesale by public utilities only under tariffs approved by FERC and conforming to the requirements FERC imposes. FERC exercised its authority to regulate the wholesale sale of electricity when it approved the umbrella market-based rate tariffs of individual public utility sellers, as well as the ISO and PX tariffs, which set forth the specific conditions of operation of the PX and ISO markets. A State may no more impose additional requirements on the operation of the market for wholesale electricity through its antitrust or unfair competition laws than it could set a "just and reasonable" price for wholesale sales of electricity in the first instance. Either type of determination

would be in the field reserved exclusively for FERC and prohibited to the States under the comprehensive regulatory framework of the FPA. Accordingly, the court of appeals correctly determined that petitioner's state-law claims, which are based on the proposition that a State *may* regulate the market for wholesale sales of electricity, are preempted.

3. Although the "field preemption" category best captures the basis for preemption of petitioner's state-law claims, the "filed rate" doctrine and conflict preemption principles also support that conclusion.

As the court of appeals recognized, petitioner's claims "ask the district court to determine the rates that 'would have been achieved in a competitive market.'" Pet. App. 10a (quoting complaint). Such a determination of fair rates under a state-law standard, however, would necessarily require the postulation of a rate different from that provided for under the tariffs approved by FERC. "[U]nder the filed rate doctrine, the Commission alone is empowered to make th[e] judgment" about the reasonableness of rates, and giving state law a role in that judgment "usurp[s] a function that Congress has assigned to a federal regulatory body." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 581-582 (1981); see *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951) ("[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes," and "except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in [their] opinion, it is the only or the more reasonable one.").

The application of conflict preemption principles leads to the same result. As the court of appeals explained in its earlier *Grays Harbor* decision, "by asking the court to set a fair price," petitioner "invok[es] a state rule * * * that would interfere with the method by which the federal statute was designed to reach its goals (specifically, FERC regulation of wholesale electricity rates)." 379 F.3d at 650. To permit petitioner "to receive in its

court action what is essentially a refund would create a conflict with FERC's authority over wholesale rates." *Ibid.* As the district court found (Pet. App. 32a), that point is illustrated by the potential conflicts between petitioner's action and FERC's currently active investigations and refund proceedings directed toward the very wholesale prices and alleged tariff violations on which petitioner relies.

4. Petitioner contends (Pet. 7, 18-20) that the filed rate doctrine does not preclude federal antitrust claims, and for that reason it should not preempt state antitrust claims either. That argument rests on the flawed premise that there is an identical standard for displacing federal and state antitrust laws. Unlike preemption of state law, however, "[r]epeals of the [federal] antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963). Contrary to petitioner's unsupported assertion (Reply Br. 6), that stringent "plain repugnancy" standard does *not* govern the question whether a state law is preempted.

Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), illustrates the point. In *Square D*, this Court reaffirmed that, although the filed rate doctrine precludes private treble damage actions under the federal antitrust laws because damage awards in such suits would be inconsistent with that doctrine, "collective ratemaking activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry," and such activities are subject to possible criminal enforcement or equitable relief. *Id.* at 421. *Square D*'s holding that the filed rate doctrine did not provide a complete immunity from federal antitrust law is of no assistance to petitioner, because the "plain repugnancy" standard that governs questions of immunity from the federal antitrust laws has no application to questions of preemption of state law. And *Square D*'s holding

that the filed rate doctrine precluded private treble damages actions even under federal antitrust law buttresses to the conclusion that petitioner's claims seeking similar damages under *state* law are precluded.[3]

5. a. Contrary to petitioner's contention (Pet. 24), the Ninth Circuit's decision in this case does not conflict with *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004). *Mirant* concerned the rejection in a federal bankruptcy proceeding of an executory contract for the purchase of power. The Fifth Circuit in *Mirant* noted that "FERC has the exclusive authority to determine wholesale rates." *Id.* at 519. Likewise, *Mirant* recognized that "the FPA would preempt any breach of contract claim where damages were sought because a lower rate would have been filed with FERC absent the breach," and would preempt "damage awards calculated using a rate other than the rate filed with FERC." *Ibid.* The court held only that rejection of an agreement in bankruptcy could be permitted where "rejection does not constitute a challenge to that agreement's filed rate," *ibid.*, as, for example, where the seller receives a secured claim against the bankruptcy estate in the amount of the electricity that "it would have otherwise sold * * * *at the filed rate*." *Id.* at 520

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[3] For similar reasons, petitioner is wrong in contending (Reply Br. 5) that "the decision below maintains that the FPA preempts all competition laws" and thus conflicts with *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). See Pet. 18-20. As petitioner elsewhere acknowledges, *Otter Tail* concluded "that *federal* antitrust laws apply to the power industry notwithstanding the FPA." Pet. 18 (emphasis added). Petitioner, however, did not bring any *federal* antitrust claims in this case and, because petitioner apparently was not a direct purchaser from respondents, it would in any event have lacked standing to do so under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). Moreover, there was no conflict in *Otter Tail* between the authority of the Commission and the antitrust decree, because the Commission at that time was found to lack authority to regulate the subject of the antitrust action about which there was a live dispute—the refusal of a utility to "wheel" (*i.e.*, transmit) power from another utility to customers. See 410 U.S. at 375-376.

Mirant permitted rejection of a power contract only where the bankruptcy court would make use of— and in no way usurp— FERC's authority to determine a "just and reasonable" rate. Yet petitioner's state-law antitrust claims would thrust the district court into precisely such usurpation if and when the court attempted to determine damages for any state-law violation.

Moreover, *Mirant* involved the coexistence of *federal* bankruptcy laws with the *federal* FPA, not the preemption of state law. As noted, implied repeal of one federal statute by another "will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). That is not the analysis that applies to preemption of state law. Accordingly, *Mirant*'s conclusion that the federal bankruptcy laws and the FPA may be construed harmoniously does not support petitioner's efforts to save state law from preemption here.

b. Petitioner also errs in contending (Reply Br. 6-7) that the decision in this case conflicts with *Florida Municipal Power Agency* v. *Florida Power & Light Co.*, 64 F.3d 614 (11th Cir. 1995). In that case, the plaintiff filed breach of contract and federal and state antitrust claims against Florida Power, based on its refusal to provide what the plaintiff termed "network service." Florida Power's existing tariff rate on file with FERC governed point-to-point service, but no separate rate was on file for network service. *Id.* at 616. The court of appeals remanded the case for a determination whether point-to-point and network services were sufficiently distinct products to require separate rates. If they were, the court of appeals held that the district court could "estimate the rate that would have been in effect but for the violation," because "[e]stimates are permissible and unavoidable in antitrust damage computations." *Id.* at 617.

Florida Municipal is not inconsistent with the decision in this case. In *Florida Municipal*, the court held that, if there were no tariff covering the sales at issue, the filed rate doctrine did not preclude the district court from making an estimate of the rates that would have been in effect absent the antitrust violation. In this case, by contrast, the court of appeals emphasized that "FERC approved tariffs [that] governed the California wholesale electricity markets," and that "if the prices in those markets were not just and reasonable or if the [respondents] sold electricity in violation of the filed tariffs, [petitioner's] only option is to seek a remedy before FERC." Pet. App. 11a. [4] The Eleventh Circuit's conclusion that in the absence of a filed tariff a district court may entertain an antitrust claim for damages does not conflict with the Ninth Circuit's conclusion in this case that where a tariff *does* govern the sales at issue, the district court may not entertain a state-law claim.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[4] Although the plaintiff in *Florida Municipal* brought state contract and antitrust claims, as well as federal antitrust claims, the court's decision did not expressly address the possible preemption of the plaintiff's state contract claims at all. The court's holding that, if Florida Power "is not immune from antitrust liability," the district court may "estimate the rate * * * without infringing on FERC's jurisdiction," 64 F.3d at 617, plainly did concern the viability of the plaintiff's antitrust claims. But since those claims were brought under both state and federal law and were no doubt largely duplicative of each other, the court did not find it necessary to address any distinct questions concerning the possible preemption of the state antitrust claims. Accordingly, the court's conclusion is best seen as resting on the conclusion that plaintiff's federal antitrust claim is viable, not any holding on the possible preemption of state law. For that reason, too, *Florida Municipal* does not conflict with the Ninth Circuit's holding that state antitrust laws are preempted in this case.

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NO. 04-621

IN THE SUPREME COURT OF THE UNITED STATES

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF WASHINGTON,

Petitioner,

v.

DYNEGY POWER MARKETING, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, ARKANSAS, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Federal Power Act authorizes the Federal Energy Regulatory Commission to regulate the interstate wholesale sale of energy and provides that utilities shall file schedules showing all rates and charges for any transmission or sale of electricity.

1. Does the Federal Power Act preempt state laws that provide a remedy for antitrust violations, fraud, or deceptive practices under state consumer protection law related to the interstate sale or transmission of wholesale electricity?

2. Does the "filed rate doctrine" bar application of state laws that provide a remedy for antitrust violations, fraud, or deceptive practices when no rate schedules were filed with the Federal Energy Regulatory Commission and the wholesale price of electricity was set by the sellers in the exercise of their market power?

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ACRONYMS

CPA – Washington Unfair Business Practices And Consumer Protection Act

FCC – Federal Communications Commission

FERC – Federal Energy Regulatory Commission

FPA – Federal Power Act

ICC – Interstate Commerce Commission

ISO – Independent System Operator

RICO – Racketeer Influenced And Corrupt Organization Act

INTEREST OF AMICI CURIAE

Washington and the other amici states have two important interests in the outcome of this case. The first is the ability of states to enforce state laws enacted to prevent fraud and protect consumers and is shared by all amici states. The second interest pertains to those western states directly harmed by the energy crisis of 2000-2001 and involves their ability and the ability of their citizenry to redress the particular harms.

A. State Enforcement Authority

The first interest is the ability of states to enforce state laws enacted to prevent fraud and protect consumers. For example, Washington historically has protected its citizens by means of various statutes, including the Washington Unfair Business Practices–Consumer Protection Act, Wash. Rev. Code 19.86 (CPA); the Washington Criminal Profiteering Act, Wash. Rev. Code 9A.82; and other statutory and common laws. The CPA includes both antitrust and consumer protection provisions.[1] The Washington Attorney General is empowered to obtain civil penalties, restitution, injunctive relief, and costs and attorneys fees for violations of the CPA.[2] The Washington Criminal Profiteering Act is

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[1] Wash. Rev. Code 19.86. The consumer protection provisions of the Washington statute are analogous to Cal. Bus. & Prof. Code § 17200, while the antitrust provisions are similar to Cal. Bus. & Prof. Code § 16720 (the Cartwright Act). Both of the California statutes were bases for the petitioner's claims.

[2] Wash. Rev. Code § 19.86.140 provides that violations of Wash. Rev. Code § 19.86.030 (prohibiting contracts, combinations, or conspiracies in restraint of trade) and Wash.

analogous to the federal Racketeer Influenced And Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968. Under the Criminal Profiteering Act, an individual or corporation is civilly liable for a pattern of conduct violating certain enumerated criminal offenses. A pattern is at least three related acts within five years. Wash. Rev. Code § 9A.82.010(12).

This interest is particularly significant in the area of the sale of electric energy. State law could redress a wide range of fraudulent activities that have taken place. In addition to the applicability of state consumer protection laws, the criminal guilty pleas entered by former Enron traders Timothy Belden, Michael Richter, and John Forney[3] contain statements that would support a civil action under the Criminal Profiteering Act. Although the pleas themselves are to conspiracy to commit federal wire fraud, which is not a predicate offense under the state statute, each of the defendants made statements in their plea agreements potentially inculpating them in the state law crimes of theft and

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Rev. Code § 19.86.040 (prohibiting monopolization and attempts to monopolize) are punishable by civil penalty of up to $500,000 per violation, and that violations of Wash. Rev. Code § 19.86.020 (prohibiting unfair methods of competition and unfair or deceptive acts or practices) are punishable by civil penalty of up to $2,000 per violation.

[3] Three key Enron traders have recently entered guilty pleas in which they have admitted engaging in fraudulent activities. *United States v. Belden*, No. CR-02-0313- MJJ (D.C. N.D. Cal. 2002); *United States v. Richter*, No. CR-03-0026-MJJ (D.C. N.D. Cal. 2003); *United States v. Forney*, No. CR-03-0178-MJJ (D.C. N.D. Cal. 2004).

money laundering. Each of those is a predicate offense supporting a civil Criminal Profiteering Act claim for penalties for each pattern of conduct established and for injunctive relief.

In contrast to the broad state authority over fraudulent and deceptive practices, the Federal Energy Regulatory Commission (FERC) has jurisdiction only over transmission and over buyers and sellers of wholesale electricity in interstate commerce, and then, only as to rates and conditions of sales at wholesale.[4] Those harmed by even the most egregious conduct by the sellers cannot seek complete redress from FERC, nor is there any remedy for them under federal statutes.[5]

Despite this limited FERC jurisdiction, the Ninth Circuit held that such FERC authority displaces the broadly applicable state law. The Ninth Circuit's decision limits or abolishes the states' ability to pursue penalties, injunctive relief, or restitution from companies that have engaged in unfair, misleading, deceptive, or fraudulent conduct. If the decision below is allowed to stand, the states and their citizens are left without any effective

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[4] *See New York v. FERC*, 535 U.S. 1, 11 (2002).

[5] In a very technical sense, FERC can issue refunds to "any person" complaining of a violation of the Federal Power Act [FPA]. 16 U.S.C. § 825e. However, this remedial authority is limited to violations of the FPA and does not encompass state consumer protection act violations or other state law violations. *See generally* U.S. General Accounting Office, *Energy Markets: Concerted Actions Needed By FERC To Confront Challenges That Impede Effective Oversight* (GAO-02-656) (June 2002).

remedy to market manipulation in the buying and selling of electricity.

B. Recovery For Harm

A second and related interest in these issues arises from the fact that Washington and some of the amici states are within the western interconnection, so-called because it is a single, large geographic market in which electricity is bought and sold at wholesale and can be moved via the physical interconnections across the grid.[6] During the western energy crisis of 2000-2001, prices soared to levels far above their normal, historic levels.[7] To a substantial degree, these skyrocketing energy prices were the result of fraud on the part of energy companies.[8] In addition, FERC has made public voluminous data from various proceedings arising from the western energy crisis[9] that include

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[6] FERC has recognized that the states in the western interconnection effectively are in the same market. *San Diego Gas & Elec. Co. v. Sellers Of Energy & Ancillary Servs. Into Markets Operated By The California Indep. Sys. Operator Corp. & The California Power Exchange*, 95 FERC 61,418, at *6 (June 19, 2001) ("There is a critical interdependence among the prices in the [Independent System Operator]'s organized spot markets, the prices in the bilateral spot markets in California and the rest of the west, and the prices in forward markets.").

[7] *See, e.g.*, U.S. Senate Committee On Commerce, Science & Transportation, Testimony of Robert McCullough, Apr. 11, 2002 (http://commerce.senate.gov/hearings/041102 McCullough.pdf).

[8] *See supra* note 3.

[9] *E.g., American Elec. Power Serv. Corp. v. Sellers Of Energy & Ancillary Servs. Into Markets Operated By The California Indep. Sys. Operator Corp. & The California Power Exchange*, 107 FERC 61,108 (May 5, 2004).

disclosures demonstrating that certain energy companies sold into amici states using schemes colorfully named "Death Star"[10] and "Ricochet"[11] transactions, among others. These fraudulent practices severely harmed the businesses and citizens of these amici states. Accordingly, these states have a substantial interest in seeing that there is an effective means to redress these injuries.

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[10] "Death Star", also known as a "circular schedule", refers to a scheme in which power is scheduled across transmission lines forming a closed loop with parts of the loop being in different control areas. This scheme was run to take advantage of transmission congestion on California transmission lines. The California Independent System Operator (ISO) paid generators to decongest lines by sending power in the opposite direction from the congestion. The ISO considered a line decongested if a seller scheduled power on it in the direction opposite the congestion and would pay the seller based only on the schedule. This led Enron and others to begin submitting looping schedules creating the illusion of decongestion—and getting paid for the illusion—then canceling the schedule before sending any power. In order to run a circular schedule, the scheduler must misrepresent the origin or destination of the power and the scheduler's intention to provide the power. The schedule is cancelled before any power flows, making the entire thing illusory and leaving customers to pay millions for nothing. *See* FERC, *Final Report On Price Manipulation In Western Markets: Fact-Finding Investigation Of Potential Manipulation Of Electric And Natural Gas Prices*, Docket No. PA02-2-000, at VI-26 (Mar. 2003) (*FERC 2002 Final Report*).

[11] "Ricochet" refers to a practice sometimes called "megawatt laundering". In a Ricochet, a seller in the California ISO control area will send power out of the control area, then immediately bring it back, misrepresenting it as having originated from an out of area generator, and thus, avoiding mandatory price caps in place in California. *FERC 2002 Final Report* at VI-17.

The amici states within the western interconnection have a strong interest in supporting their own ability, and the ability of their citizens, to recover for the serious harms they have suffered from market abuses brought about by manipulation of an essentially unregulated wholesale electricity market. All amici states have a substantial interest in their ability to enforce their laws for the protection of their consumers, including the various state consumer protection laws, state RICO statutes such as Washington's Criminal Profiteering Act, and other laws of general application intended for the benefit and protection of consumers. Accordingly, we submit this amicus brief to focus the Court's attention on important threats to the authority of the states to enforce their laws and protect their businesses and consumers.

ARGUMENT

The Ninth Circuit's decision below liberally cites to and incorporates the holdings and reasoning expressed in three other Ninth Circuit decisions. *People of California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004); *Pub. Util. Dist. 1 of Grays Harbor County, Washington v. Idacorp, Inc.*, 379 F.3d 641 (9th Cir. 2004); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). These four decisions hold that state law remedies for fraud in the interstate sale of energy are preempted by the Federal Power Act, 16 U.S.C. §§ 791a-828c, and the filed rate doctrine. Under the analysis adopted and approved by the Ninth Circuit, states would be prevented from enforcing material provisions of state law used to protect consumers and businesses against predatory and fraudulent

practices. Such a result would severely and unduly injure all amici states.

The Court should grant review for three reasons. First, the decision below conflicts with various decisions of the United States Court of Appeals for the Fifth Circuit, including *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), and *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), a recent decision relying on *Gulf States*. Second, there is substantial tension between the Ninth Circuit's analysis in the decision below and this Court's decisions in *Maislin Industries, U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994). Third, under the Ninth Circuit's analysis, states would be unable to pursue even the most egregious wrongdoers for violations of their state consumer protection laws. These laws are broadly applicable across a range of businesses and practices where more pervasive regulations are not in place. They serve as the foundation of the states' interest in ensuring markets operate competitively and consumers are protected. The decision below bars enforcement of these laws, even where FERC is not expressly preempting state action and the violations have only an indirect connection to rates.

A. The Ninth Circuit Decision Is In Conflict With The Fifth Circuit Decisions In *Gulf States Utilities Co. v. Alabama Power Co.* And *In Re Mirant Corp.*

This Court should accept review to resolve a conflict between the circuits. The Ninth Circuit held that the Federal Power Act preempted enforcement

of state consumer protection laws designed to ensure the operation of a fair market, even when FERC has implemented a "market-based" system of establishing rates. The Ninth Circuit phrased the question as "whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws". *Pub. Util. Dist. 1 of Snohomish County, Washington v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 760 (9th Cir. 2004). The court below concluded that FERC was adequately engaged in regulation, citing "umbrella tariffs" that authorize sellers to sell at market rates, the filing of quarterly reports that permit FERC (and presumably customers of the sellers and the public) to ascertain the reasonableness of the rates, and more detailed tariffs of the California Power Exchange and the California Independent System Operator.

In contrast to the preemption analysis applied by the Ninth Circuit, the Fifth Circuit has consistently reached a very different conclusion. This conflict turns on very different views of the scope and effect of federal preemption. The Ninth Circuit has impermissibly expanded that analysis; the Fifth Circuit has correctly applied a more limited test. Instead of the blanket preemption conclusion reached by the Ninth Circuit, the Fifth Circuit has recognized that FERC jurisdiction does not preclude all other actions.

Gulf States involved an application by Gulf States Utilities Company for issuance of bonds to finance refunding of part of the utility's outstanding debt. Two intervening cities opposed issuance of the bonds because they would be used for an

anticompetitive purpose. The Federal Power Commission denied the objection, declined to hold a hearing on the anticompetitive effects of the bond issuance, and approved issuance of the bond. Intervenors appealed, and the Fifth Circuit remanded the case to the Federal Power Commission for a hearing to consider the anticompetitive impact of the bond issuance.

The Fifth Circuit wrote: "[T]he FPA [Federal Power Act] would not necessarily forbid the district court to set aside contracts obtained unconscionably or by fraud" in an action challenging certain contracts for the sale and purchase of wholesale electric power sold in interstate commerce. *Gulf States*, 824 F.2d at 1472. The court found that "[t]he district court would have jurisdiction if [plaintiff] claimed that it cannot take Southern's electricity *regardless of price*." *Id.*

Following *Gulf States*, *In re Mirant Corp.* was a bankruptcy case in which a Chapter 11 debtor-in-possession moved for an order authorizing rejection of an executory power purchase contract. The bankruptcy court ultimately denied the motion and the debtor appealed.

The Fifth Circuit stated the issue as "whether a district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization, or whether Congress granted [FERC] exclusive jurisdiction over these contracts". *In re Mirant Corp.*, 378 F.3d at 514.

The court found that preemption did not bar a court from determining whether a contract had been breached. *Id.* at 519. The court wrote:

> "Outside of the bankruptcy context, the FPA does not provide FERC with exclusive jurisdiction over the breach of a FERC approved contract. While the FPA does preempt breach of contract claims that challenge a filed rate, district courts are permitted to grant relief in situations where the breach of contract claim is based upon another rationale. *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1471-73 (5th Cir. 1987); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981) (declining to disturb a state court decision holding that a party breached a contract that was subject to FERC regulation by failing to comply with state laws that also applied to that contract). For example, *Gulf States* held that the FPA would preempt any breach of contract claim where damages were sought because a lower rate would have been filed with FERC absent the breach, but there is no preemption if damages were sought because the breach caused an increase in the quantity purchased at the filed rate. *Gulf States*, 824 F.2d at 1471." *In re Mirant Corp.*, 378 F.3d at 519.

In sum, while the Fifth Circuit continues to hold that FERC does not have exclusive jurisdiction over FERC approved rates, the Ninth Circuit held that *all* issues pertaining to FERC jurisdictional contracts are preempted and within the exclusive jurisdiction of FERC. *Pub. Util. Dist. 1 of Snohomish County, Washington v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 762 (9th Cir. 2004). Quoting its

decision in *People of California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852 (9th Cir. 2003), the Ninth Circuit stated:

> "We said: 'remedies for breach and non-performance of FERC-approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC.'" *Snohomish County*, 384 F.3d at 762.

This is a significant conflict that requires resolution by this Court. Particularly in this time of transition in the regulation of electric markets and service, the scope of federal preemption is a critical issue since it necessarily sets out the limits of the states' ability to enact and enforce laws to protect their citizens.

B. The Ninth Circuit's Filed Rate Analysis Is In Substantial Tension With This Court's Rulings In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* And *MCI Telecommunications Corp. v. AT&T*

The Ninth Circuit's preemption analysis is in substantial tension with this Court's rulings in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994). Both cases involved the power of a regulatory agency to deviate from the statutory requirement to require filed tariffs that provide predictability, stability, and non-discriminatory treatment to all participants in their respective markets.

Maislin Industries arose under the Interstate Commerce Act, a statute that, like the Federal Power Act, required common carriers to publish rates in tariffs filed with a regulatory agency, the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762. The ICC had adopted a policy allowing carriers to privately negotiate lower rates amongst themselves. Where such a negotiated rate existed, the carriers were relieved from their obligation to adhere to the filed tariff.

The case arose from a bankruptcy in which the estate sought the difference between a lower rate negotiated pursuant to that policy and the higher filed rate. The estate argued that the ICC could not lawfully depart from the filed rate and that such secretly negotiated rates were discriminatory and violated the Interstate Commerce Act. This Court held that the ICC could not properly allow interstate carriers to privately negotiate rates different than those in the filed tariff.

MCI arose under the Federal Communications Act, a statute requiring telephone carriers to adhere to a filed rate. As with FERC in the instant matter, the Federal Communications Commission (FCC) sought to reduce regulation and open rates within its jurisdiction to the open market by making adherence to a filed tariff optional. The FCC argued that this was within its statutory authority to modify the tariffing requirements.

On appeal, this Court rejected the FCC's argument and held that the FCC could not properly eliminate filed tariffs in favor of a purely deregulated scheme that opened rates to the free market without oversight.

The instant case has much in common with both *Maislin Industries* and *MCI*. Here, the Ninth Circuit held that the filed rate doctrine precluded the cause of action of the petitioner—even though no specific rate was ever filed with FERC. This is inconsistent with *Maislin Industries* and *MCI* which hold that the agencies could not eliminate the filed rate. The court of appeals does not address either case in the decision below. However, in another case arising from the western energy crisis, the Ninth Circuit explained its preemption and filed rate analysis in more detail, seeking to distinguish *Maislin Industries* and *MCI*. In *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004),[12] the Ninth Circuit wrote:

> "However, the regulatory scheme before us is different from those under consideration in *MCI* and *Maislin*. The agencies in *MCI* and *Maislin* relied on market forces alone in approving market-based tariffs. In contrast, FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to

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[12] The Ninth Circuit currently has before it petitions for rehearing in *California ex rel. Lockyer v. FERC*.

> ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." *California ex rel. Lockyer*, 383 F.3d at 1013.

The "strict reporting requirements" are after the fact quarterly filings that do not meet the test of *Maislin Industries* and *MCI*. Because the market-based rate system of FERC does not protect the public in the same way as a true "filed rate", as supported by *Maislin Industries* and *MCI*, the privately negotiated rates disapproved in *Maislin Industries* are little different from the privately negotiated sales under FERC's market-based regime. The point here is not to attack, as a matter of law, the validity of the market-based rate system of FERC.[13] Rather, the point is that, where such a system has been implemented, it is inconsistent with this Court's precedents to restrain the operation of state laws, such as those of the amici states, that are designed to protect consumers and ensure the competitiveness of markets.

If the Ninth Circuit decision stands, amici states and the citizens and businesses that depend on them are left in the worst of all worlds—electricity markets proven to be subject to anticompetitive and fraudulent activities, but lacking the basic structural and behavioral remedies common to all other markets.

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[13] The question of the legality of market-based rates is being pursued in the United States Court of Appeals for the District of Columbia Circuit in *Colorado Office of Consumer Counsel v. FERC*, No. 04-1238 (filed July 16, 2004).

C. The Questions In This Case Are Important Because State Consumer Protection Laws Provide A Remedy For Fraud And Consumer Protection Violations That FERC Does Not

FERC has jurisdiction over interstate buyers and sellers of wholesale electricity. Though the FPA provides remedies to such buyers and sellers, the real harm inflicted by the manipulation of wholesale markets goes beyond just immediate buyers. It impacts businesses and citizens who buy electricity at retail, in transactions beyond the scope of FERC authority.

By contrast, Washington's Unfair Business Practices And Consumer Protection Act, Wash. Rev. Code 19.86, provides protections and remedies to all those who are harmed by malfunctioning markets. It authorizes the recovery of treble damages in appropriate cases, in addition to restitution, disgorgement, and injunctive relief. In addition, the state is entitled to recover civil penalties, including penalties up to $2,000 for each violation of the consumer protection provisions and up to $500,000 for each violation of the antitrust provisions.[14]

The Ninth Circuit's conclusion that state law, and thus, state law remedies for harm inflicted by FERC jurisdictional sellers of wholesale electricity, are preempted by FERC leaves the citizens of all of the amici states without any protection under state law. Those amici states within the western interconnection represent consumers who were truly

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[14] Wash. Rev. Code § 19.86.140.

harmed during the energy crisis, and the Ninth Circuit decision precludes those amici states from pursuing a remedy for that harm. Nothing in the legislative history of the FPA supports this sweeping abolition of state authority to enforce consumer protection laws or to seek redress on behalf of their citizens.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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